

Circuit acknowledged that twenty-eight cents was a “de minimis” amount and characterized the monetary award as “nominal,” yet it argued that class certification should not be barred on those grounds.<sup>82</sup> While one who upholds the goal of providing access to justice might not deny that compensation of class members is worthwhile, they would stress the importance of representing people in class actions in the first place—not only as a necessary prerequisite to compensating them, but as an important goal even in the absence of meaningful compensation. This is aligned with the priorities of class members with nonvaluable claims. These class members are not in a position to be choosy about the amount of compensation they receive from the class action, given the small size of their claims and the reality that they would not otherwise achieve any compensation at all. If these class members care about the class action, they may assign greater importance to the dignitary value of being represented in a class action that can vindicate grievances they hold and allows them to participate, even if only by proxy, in a meaningful judicial process.

The representation justification is also associated with the public goal of shaping laws and norms through lawsuits that are made possible by the inclusion of nonvaluable claims in class actions. Some commentators have suggested that the class as an entity has rights and interests worthy of recognition.<sup>83</sup> Some have made broader arguments that including more people in more lawsuits, and therefore giving rise to litigation over more kinds of grievances, yields important public benefits through qualitative effects such as shaping legal and ethical norms.<sup>84</sup> These arguments suggest that the public benefits of litigation go beyond monetary deterrence. They cut against the tendency to view litigation as a necessary evil and suggest that at least some litigation is a public good, independent and apart from any direct effects on private parties.<sup>85</sup> The goal of shaping laws and norms fits

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82. *Id.*

83. Issacharoff, *supra* note 58, at 1060; David L. Shapiro, *Class Actions: The Class as Party and Client*, 73 *Notre Dame L. Rev.* 913, 919 (1998). It is unorthodox to view a class as an entity that deserves its day in court. Still, this may be a useful model if the class is a stand-in for societal interests. For a critique of the entity model, see Redish, *Wholesale Justice*, *supra* note 5, at 148–56.

84. See, e.g., Cox, *Shareholder Suits*, *supra* note 76, at 5 (arguing that the very existence of a lawsuit subjects defendants to “social opprobrium,” and therefore the possibility of a lawsuit serves as a nonmonetary deterrent to misbehavior); Lahav, *Political Justification*, *supra* note 62, at 3197–205 (arguing that class actions promote the rule of law by revealing information that is otherwise hidden, holding wrongdoers accountable, promoting equality before the law, and providing a forum for reasoned deliberation); Rubenstein, *Positive Externalities*, *supra* note 62, at 723–25 (arguing that class actions produce “positive externalities” in the form of decrees that guide future behavior, settlements that serve as a guide for future litigation, threats against misbehavior, and shifts in the burden of enforcement toward the private sector).

85. For an affirmative argument that litigation is a public good, not limited to the context of class actions, see generally Alexandra Lahav, *In Praise of Litigation* (2017). Professor Alexandra Lahav argues that litigation provides societal benefits through four mechanisms: (1) enforcing the law; (2) providing transparency by revealing information that informs

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within the representation justification because, like the goal of providing access to justice, it involves qualitatively changing litigation by making it more representative. These two goals are also clearly compatible, as both goals are furthered by the inclusion of a greater number and diversity of claimants in class actions.

\* \* \*

This section has described two broad justifications for class actions and their associated goals. This taxonomy is summarized in Table 1. This section has situated these goals at the root of doctrinal and academic debates surrounding class actions, suggesting that many debates are motivated or shaped by people siding with some of these goals over others.

TABLE 1: THE GOALS OF CLASS ACTIONS

	Efficiency Goals	Representation Goals
Private Goals	<i>Compensation:</i> Class actions enable claimants to share the transactional costs of litigation, resulting in greater net compensation. This is the priority of plaintiffs with valuable claims, who do not need class actions for access to justice.	<i>Access to Justice:</i> Class actions allow more claimants and more grievances to be represented in the legal system. This is the priority of plaintiffs with nonvaluable claims, who cannot feasibly seek redress on their own.
Public Goals	<i>Monetary Deterrence:</i> Class actions increase monetary penalties for legal violations, thereby deterring misbehavior.	<i>Shaping Laws and Norms:</i> Class actions give rise to lawsuits over a wider range of grievances, and these new types of lawsuits have a significant impact over legal precedent and societal norms.

This section's discussion of the theoretical underpinnings of the goals of class actions supports two observations. First, within each justification for class actions, there appears to be no meaningful tension between the private goal and the public goal. That is, when one considers the pair of efficiency goals (compensation and monetary deterrence) or the pair of representation goals (access to justice and shaping laws and norms), the two goals within each pair are perfectly compatible. This is not to suggest that the pairs cannot be separated—people can choose to espouse the private goal without the public goal, or vice versa. In general, it seems likely that people who believe class actions serve a public goal are those who prefer a larger role for class actions, while those who only believe in a private goal prefer a smaller role for class actions.

Second, there *is* a meaningful tension between the efficiency goals and the representation goals. For one thing, efficiency and representation

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public and private decisions; (3) enabling participation in self-government; and (4) equalizing opportunities to speak and be heard. *Id.* at 1–2.

are different justifications for class actions, each having deep roots in class action history. There is also a simple conceptual difference between them: Efficiency goals seek to amplify the existing effects of litigation while representation goals seek to qualitatively change litigation. More concretely, efficiency goals and representation goals suggest different prescriptions for class actions: Efficiency goals are furthered by the inclusion of *more valuable claims* while representation goals are furthered by the inclusion of *more claimants*.

This raises an important conceptual question: Is it reasonable and consistent to believe in *both* efficiency goals and representation goals? To put it slightly differently, is it reasonable and consistent to believe equally in the efficiency justification and the representation justification? Part II demonstrates the current relevance of this question to the politics of class actions, explaining that there is currently a divide between Republicans and Democrats over whether class actions are justified by efficiency or representation. Part III endeavors to answer this question, arguing that the efficiency goals and the representation goals can, in fact, be reconciled.

## II. TWO LEGISLATIVE AGENDAS

This Part describes how the goals of class actions shape the opposing legislative agendas of Republicans and Democrats in Congress. This Part focuses on two bills, each of which passed the House of Representatives but did not become law. Section II.A discusses the Fairness Act of 2017, a Republican bill that would impose restrictions on class actions. Section II.B discusses the FAIR Act of 2019, a Democratic bill that would invalidate arbitration agreements in order to increase the availability of class actions. The Fairness Act and the FAIR Act are both named in reference to fairness, but this Part shows that they define fairness differently. Republicans only believe in the goal of compensation, which is a goal associated with the efficiency justification; Democrats believe in the goals of providing access to justice and shaping laws and norms, thereby embracing both of the goals associated with the representation justification. This leads to a conclusion that a fundamental disagreement underlying this debate is over the proper justification for class actions: Republicans believe in the efficiency justification while Democrats believe in the representation justification.

This Part views the Fairness Act and the FAIR Act as representing at least some of the genuine legislative desires of Republicans and Democrats, respectively. Both bills were supported and opposed along partisan lines, and neither came close to becoming law.<sup>86</sup> Indeed, if passing legislation

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86. The Fairness Act was passed by a Republican-controlled House of Representatives in 2017 but was never put up for a vote in the Senate. See *infra* notes 120–121 and accompanying text. Conversely, in 2019, the FAIR Act was passed by a Democratic-controlled House of Representatives but was never put up for a vote in the Senate. See *infra* notes 141–142 and accompanying text. Even if it had passed the Senate, the FAIR Act would have been vetoed by then-President Donald Trump. See *infra* note 140.

related to class actions and arbitration agreements will require give-and-take compromise between Republicans and Democrats, these bills are excellent examples of what not to do. But it is precisely because these bills were not crafted through compromise that they can be taken as reflections of reforms that Republicans and Democrats would genuinely *like* to pass.<sup>87</sup> Of course, anyone familiar with the politics of class actions is also likely to suspect that these bills are motivated by more basic desires to decrease or increase the presence of class actions in society. That may be true as well. But the point stands that these bills show *how* each party would increase or decrease class actions and reveal underlying assumptions about what class actions are for.

This Part also highlights empirical evidence about class actions that is relevant to the arguments of both sides of the debate. There is more such evidence available than ever before.<sup>88</sup> That is a promising development, as lamenting a lack of empirical evidence has long been a mainstay of commentary regarding class actions.<sup>89</sup> Perhaps it is time for that to change. This Part also shows, however, that simply having more empirical evidence does little to advance the debate when the two sides have different views of the

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87. Bills that are understood not to have a realistic chance of becoming law are sometimes called “dead-on-arrival bills.” Jeremy Gelman, Rewarding Dysfunction: Interest Groups and Intended Legislative Failure, 42 *Legis. Stud. Q.* 661, 663–64 (2017) (defining dead-on-arrival bills). The most prominent examples of dead-on-arrival bills in recent years were repeated efforts by congressional Republicans to repeal the Affordable Care Act in the face of an inevitable veto by President Obama. See, e.g., Mike DeBonis, Obama Vetoes Republican Repeal of Health-Care Law, *Wash. Post* (Jan. 8, 2016), <https://www.washingtonpost.com/news/powerpost/wp/2016/01/08/obama-vetoes-republican-repeal-of-health-care-law/> (on file with the *Columbia Law Review*).

Political scientists have found support for the intuitive view that dead-on-arrival bills express the partisan preferences of the party voting in favor of the bill, without accommodating the preferences of the opposing party. See Frances E. Lee, *Insecure Majorities: Congress and the Perpetual Campaign* 142–43 (2016) (discussing the proliferation in Congress of “partisan message votes,” which are votes taken to showcase partisan positions that the party voting in favor supports and that the other party opposes); Gelman, *supra*, at 661 (arguing that dead-on-arrival bills are intended to accrue political support from partisan interest groups).

88. For example, empirical evidence is being brought to bear on how frequently class members file claims to obtain their share of the recovery. See *infra* note 96 and accompanying text. Attorney’s fees are being compared to class recovery amounts, the amount of work attorneys do, and other variables. See *infra* notes 104–105 and accompanying text. Empirical evidence is also used to compare the frequency with which arbitration and class actions are used as vehicles for people to seek relief. See *infra* note 128 and accompanying text.

89. See, e.g., Jonah B. Gelbach & Deborah R. Hensler, What We Don’t Know About Class Actions but Hope to Know Soon, 87 *Fordham L. Rev.* 65, 66–67 (2018) (discussing the lack of empirical data about class actions and describing the kinds of data needed); Deborah R. Hensler, Happy 50th Anniversary, Rule 23! Shouldn’t We Know You Better After All This Time?, 165 *U. Pa. L. Rev.* 1599, 1602–03 (2017) (same); Miller, *Of Frankenstein Monsters and Shining Knights*, *supra* note 1, at 666 (“[D]espite the attention that has been riveted on rule 23, we have precious little empiric evidence as to how it actually has been functioning, in terms of either its alleged benefits or supposed blasphemies.”).

underlying goals of class actions. Until this underlying disagreement is addressed, empirical evidence will not prevent Republicans and Democrats from talking past one another.

A. *The Republican Proposal: The Fairness Act of 2017*

The Fairness Act of 2017 is premised on the view that class actions are broken and must be curtailed. On March 7, 2017, the House Judiciary Committee, which was under Republican control at the time, released a report (the Republican Report) recommending passage of the Fairness Act.<sup>90</sup> This report is an utterly scathing assessment of class actions. It begins by claiming that class actions are “putting . . . U.S. companies at a distinct economic disadvantage when competing with companies worldwide,” and that “[f]ederal judges are crying out for Congress to reform the class action system.”<sup>91</sup>

The Republican Report takes the view that the only goal of class actions is to increase the compensation of class members—and that class actions are failing at that goal. The central problem the report describes is that “[m]ost class actions (particularly class actions brought on behalf of consumers) produce no benefits for class members.”<sup>92</sup> In particular, it argues that, in consumer class actions, “less than [five percent] of class members on average” receive compensation,<sup>93</sup> and that even when compensation is offered to the class, “only the tiniest fraction of a percent of consumer class action members bother to claim the compensation awarded them.”<sup>94</sup>

Such arguments that class actions are performing poorly at compensation have their fair share of support among commentators.<sup>95</sup> They arguably also have empirical support. Two years after the Republican Report, an FTC study found that the median rate of class members filing claims was nine percent.<sup>96</sup> This is far more than “the tiniest fraction of a percent,” yet it does not refute the general idea that few class members receive compensation.

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90. H.R. Rep. No. 115-25 (2017).

91. *Id.* at 2.

92. *Id.* at 3.

93. *Id.*

94. *Id.* at 21.

95. E.g., William W. Bratton & Michael L. Wachter, *The Political Economy of Fraud on the Market*, 160 U. Pa. L. Rev. 69, 94–101 (2011) (stating that shareholders compensated by securities fraud class actions based on the fraud-on-the-market theory recover only a fraction of their losses); Mullenix, *supra* note 4, at 418–20 (arguing that there is little evidence that class actions effectively compensate victims of wrongdoing and citing some evidence that they do not).

96. FTC, *Consumers and Class Actions: A Retrospective and Analysis of Settlement Campaigns* 11, 13 (2019), [https://www.ftc.gov/system/files/documents/reports/consumers-class-actions-retrospective-analysis-settlement-campaigns/class\\_action\\_fairness\\_report\\_0.pdf](https://www.ftc.gov/system/files/documents/reports/consumers-class-actions-retrospective-analysis-settlement-campaigns/class_action_fairness_report_0.pdf) [<https://perma.cc/C86E-W9F4>] (analyzing 149 consumer class actions and finding a median claim filing rate of nine percent).

The Republican Report also reveals its focus on the goal of compensation by making arguments that plaintiff's attorneys make too much money from class actions in comparison with the compensation of the class. The report argues that class actions permit "unscrupulous lawyers to fill classes with hundreds and thousands of unmeritorious claims and use those artificially inflated classes to force defendants to settle the case."<sup>97</sup> It argues that "[w]hen cases are settled, the fees for lawyers representing the class take up a large share of the settlement, typically millions of dollars per case."<sup>98</sup> It also claims that "because so few class members receive settlement payments in most cases, the amount paid to lawyers is often many times the amount actually paid to class members."<sup>99</sup>

Again, the idea that plaintiff's attorneys face distorted incentives has some support among commentators.<sup>100</sup> To combat these concerns, trial courts are responsible for ensuring that class action settlements reflect the interests of the class.<sup>101</sup> Still, some argue there should be additional limits to prevent fee awards that are outsized relative to the compensation received by the class.<sup>102</sup> As for empirical evidence, the Republican Report does not cite data to support its argument that attorney's fees are too high.<sup>103</sup> One recent empirical study might cut against this argument, finding that attorney's fees are closely correlated with recovery amounts.<sup>104</sup> Even so, it is reasonable to be concerned that attorney's fees are often higher than they need to be, especially when the class receives a particularly large financial award.<sup>105</sup>

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97. H.R. Rep. No. 115-25, at 2.

98. *Id.* at 3.

99. *Id.*

100. Some commentators have argued that class action plaintiff's attorneys are incentivized to agree to settlements early in the litigation process on terms that are favorable to them and to defendants, but not as favorable to the class as whole. See Coffee, *Understanding the Plaintiff's Attorney*, *supra* note 7, at 688–90; Koniak & Cohen, *supra* note 6, at 1056–57; see also Martin H. Redish, *Class Actions and the Democratic Difficulty: Rethinking the Intersection of Private Litigation and Public Goals*, 2003 U. Chi. Legal F. 71, 90–93 (distinguishing between attorneys who seek client compensation and those who seek only their own fee).

101. Manual for Complex Litigation (Fourth) § 21.61 (2004) (outlining the "critical" role of the trial court in reviewing class action settlements by examining "whether the interests of the class are better served by the settlement than by further litigation," and noting that "the adversariness of litigation is often lost after the agreement to settle").

102. E.g., Mullenix, *supra* note 4, at 444–46 (discussing possible reforms to attorney financing, such as public financing of class litigation and a loser-pays rule).

103. The report simply describes three examples of class actions in which class members received no compensation while attorneys were well compensated. H.R. Rep. No. 115-25, at 21–22.

104. Theodore Eisenberg, Geoffrey Miller & Roy Germano, *Attorneys' Fees in Class Actions: 2009–2013*, 92 N.Y.U. L. Rev. 937, 940 (2017) (describing the relationship between the monetary class recovery amount and attorney's fees as "amazingly regular").

105. This is the conclusion of a recent empirical study of large securities fraud class action settlements. Stephen J. Choi, Jessica Erickson & A. C. Pritchard, *Working Hard or Making Work? Plaintiffs' Attorney Fees in Securities Fraud Class Actions*, 17 J. Empirical

It is important to observe that the Republican Report does not consider monetary deterrence to be a goal of class actions, even though, like the goal of compensation, the goal of monetary deterrence is associated with the efficiency justification. The Republican Report states that “the *whole purpose* of class actions is to redress the injuries sustained by class members.”<sup>106</sup> It also criticizes the practice of cy pres awards, which give any award money that cannot be distributed to class members to nonprofit organizations.<sup>107</sup> Cy pres awards are consistent with the goal of monetary deterrence but not the goal of compensation, so this stance is further evidence that the Republican Report rejects monetary deterrence. The present compensation-only stance of Republicans contrasts with the views of many conservative-leaning legal commentators, who have often taken the goal of monetary deterrence more seriously.<sup>108</sup>

The Fairness Act contains two categories of provisions: Some would curtail class actions in a relatively arbitrary fashion, while others would curtail only class actions that are less effective at compensation. Both of these are logical avenues of reform for legislators who believe class actions are failing at an essential goal of compensation. In the more arbitrary category, the most significant provision is a requirement that federal courts only certify class actions for monetary relief if “each proposed class member suffered the same type and scope of injury as the named class representative[s].”<sup>109</sup> Given that Rule 23 already includes requirements that tend to ensure class members have suffered similar types of harm,<sup>110</sup> the effect of this provision would be to eliminate class actions in which class members are entitled to different amounts of damages, without any particularized rationale for targeting these class actions.<sup>111</sup> This provision is best understood as a broadside attack on class actions.

Other provisions of the Fairness Act would require class actions to be more effective at compensation. One provision requires plaintiffs to demonstrate, as a prerequisite to class certification, that there is “a reliable and administratively feasible mechanism . . . for distributing directly to a substantial majority of class members any monetary relief secured for the

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Legal Stud. 438, 464 (2020) (arguing that attorneys are rewarded with far higher fees and appear to work less efficiently when working on large settlement cases, and that “being appointed as lead counsel in a securities class action that is likely to end with a large settlement is like receiving a winning lottery ticket”).

106. H.R. Rep. No. 115-25, at 19 (emphasis added).

107. *Id.* at 24 (describing cy pres awards as a “troubling trend” that “raises serious questions about the purpose of the class action device”).

108. E.g., Fitzpatrick, *The Conservative Case*, supra note 14, at 103–13; Posner, supra note 76, at 803; Dam, supra note 76, at 60–61.

109. H.R. 985, 115th Cong. § 1716(a) (2017).

110. See supra notes 49–51 and accompanying text.

111. Howard M. Erichson, *Searching for Salvageable Ideas in FICALA*, 87 Fordham L. Rev. 19, 21–22 (2018) (concluding that this provision of the Fairness Act would restrict class actions without serving any particularized rationale).

class.”<sup>112</sup> The Republican Report justifies this provision by stating that “[b]ecause the whole purpose of class actions is to redress the injuries sustained by class members, the system should ensure that any benefits obtained in such cases can actually be delivered to those class members.”<sup>113</sup> Notably, this provision would limit nonvaluable claims, as it is expensive and often infeasible to distribute money to a “substantial majority” of class members when most class members are only entitled to small amounts of money—and it is harder still to devise a mechanism for doing so at the class certification stage.<sup>114</sup> The Fairness Act also limits attorney’s fees based on monetary relief to “a reasonable percentage of any payments directly distributed to and received by class members.”<sup>115</sup> Further, attorney’s fees based on monetary relief cannot be paid until the distribution of the monetary recovery to class members is completed and cannot exceed “the total amount directly distributed to and received by all class members.”<sup>116</sup> These provisions clearly assume that compensation is the primary yardstick by which the value of class actions, and therefore also the work of plaintiff’s attorneys, should be assessed.

In explaining their unanimous opposition to the Fairness Act, Democrats had an entirely different way of understanding the purpose of class actions. The dissenting views of Democratic members were included at the end of the Republican Report.<sup>117</sup> They did not engage in any depth with the arguments that class actions result in too little compensation for class members and excessive attorney’s fees. Instead, the Democrats emphasized that the bill would deny small claimants access to justice.<sup>118</sup> They also argued that because class actions provide small claimants with access to justice, they “are particularly vital in consumer protection, civil rights, antitrust, personal injury, and employment cases.”<sup>119</sup> This alternative view

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112. H.R. 985 § 1718(a).

113. H.R. Rep. No. 115-25, at 19 (2017).

114. See John C. Coffee, Jr., How Not to Write a Class Action “Reform” Bill, CLS Blue Sky Blog (Feb. 21, 2017), <https://clsbluesky.law.columbia.edu/2017/02/21/how-not-to-write-a-class-action-reform-bill/> [<https://perma.cc/83V4-NU7Q>] (“It makes no sense to deny certification simply because a ‘substantial majority’ of the class cannot be identified at the class certification stage (when it is both costly and infeasible to reach them).”).

115. H.R. 985 § 1718(b). In the context of multidistrict litigation, the Fairness Act also imposes a hard ceiling of twenty percent on attorney’s fees. *Id.* sec. 105(l).

116. *Id.*

117. H.R. Rep. No. 115-25, at 45–63.

118. *Id.* at 45 (“Class actions are a critical tool for allowing those injured by corporate wrongdoing to receive some measure of justice by making it economically feasible to pursue claims that are too small or too burdensome to pursue on an individual basis, but are nonetheless meritorious.”). Only after emphasizing the goal of providing access to justice did the dissenting Democrats also mention efficiency gains from class actions—though, interestingly, they emphasized the efficiency benefits to courts, not plaintiffs. *Id.* (“Finally, they promote the efficient consideration of numerous cases raising substantially the same factual and legal questions, thereby lessening burdens on courts.”).

119. *Id.*

of the goals of class actions was largely ignored by the Republicans. Unsurprisingly, the Fairness Act passed the House of Representatives along partisan lines, with Republicans voting 220-14 in favor and Democrats voting 0-187 opposed.<sup>120</sup> It was never put up for a vote in the Senate.<sup>121</sup>

B. *The Democratic Proposal: The FAIR Act of 2019*

The FAIR Act of 2019 is premised on the view that class actions are working, and that the real threat lies in mandatory arbitration agreements that preclude class litigation.<sup>122</sup> After Democrats won control of the House of Representatives in the 2018 midterm election, Republican concerns with class actions were set aside. On September 13, 2019, the House Judiciary Committee, now under Democratic control, released a report (the Democratic Report) recommending passage of the FAIR Act.<sup>123</sup> The Democratic Report argues that mandatory arbitration agreements should be invalidated to “restore access to justice for millions of Americans who are currently locked out of the court system.”<sup>124</sup>

The Democratic Report takes the view that an essential goal of class actions is providing access to justice, so that more people and more grievances are included in litigation. The report does not analyze whether class actions achieve greater compensation than arbitration, thereby ignoring the criterion used by the Republican Report in assessing whether class actions are working.<sup>125</sup> Instead, the Democratic Report focuses on whether it will be feasible for people to pursue their claims at all without class actions, stating that “arbitration clauses appear to dissuade consumers from adjudicating disputes altogether” and that “the lower probability of victory[] and meager legal fees associated with mandatory arbitration may also discourage attorneys from representing individuals in arbitration proceedings.”<sup>126</sup>

Many legal commentators share the concern that mandatory arbitration agreements lock small claimants out of the legal system.<sup>127</sup> A 2015

120. Roll Call 148, Clerk of the U.S. House of Representatives (Mar. 9, 2017), <https://clerk.house.gov/Votes/2017148> [<https://perma.cc/Y75S-G7PA>].

121. Alison Frankel, Class Action Reform Isn't Dead. It's Just Not Coming From Congress., Reuters (Dec. 28, 2018), <https://www.reuters.com/article/legal-us-otc-class-action-idUSKCN1OR1G1> [<https://perma.cc/28TH-T5RU>] (“The [Fairness Act] passed the House [of Representatives] with alacrity but never even made it to a vote in the Senate Judiciary Committee, let alone [before] the full body.”).

122. For background on the relationship between mandatory arbitration agreements and class actions, see *supra* notes 10–15 and accompanying text.

123. H.R. Rep. No. 116-204 (2019).

124. *Id.* at 4.

125. See *id.* at 6 (“Although proponents of arbitration claim that it decreases litigation costs for consumers, consumers often do not receive any benefit of reduced costs through forced arbitration.”).

126. *Id.*

127. E.g., Jean R. Sternlight, Tsunami: *AT&T Mobility L.L.C. v. Concepcion* Impedes Access to Justice, 90 Or. L. Rev. 703, 722–24 (2012); Editorial, Gutting Class Action, N.Y. Times (May 12, 2011), <https://www.nytimes.com/2011/05/13/opinion/13fri1.html> (on file with the *Columbia*

study by the Consumer Financial Protection Bureau also supports this conclusion, finding that between 2010 and 2012, approximately thirty-two million consumers of financial products were eligible for relief each year as class members in class actions, while only 600 analogous arbitration cases and 1,200 analogous individual federal lawsuits were filed each year.<sup>128</sup>

The Democratic Report also takes the view that class actions serve a public goal of shaping laws and norms, arguing that excluding many people and grievances from the legal system eliminates lawsuits that have a public importance beyond monetary deterrence. It argues that arbitration will fail to challenge certain categories of misconduct that are only feasible to litigate in class actions, and that arbitration decisions do not have the same legitimacy as court decisions because “there is no guarantee that the relevant law will be applied to these disputes or that fundamental notions of fairness and equity will be upheld in the process.”<sup>129</sup> Moreover, the Democratic Report argues that the secretive nature of arbitration makes it less effective at stopping wrongdoing than litigation that takes place in the open.<sup>130</sup> Notably absent from the Democratic Report is any claim that arbitration fails to prevent misbehavior because it does not provide enough monetary deterrence.

The FAIR Act is designed to advance a fundamental priority of including more people in class actions. The stated purpose of the bill is to “prohibit agreements and practices that interfere with the right . . . to participate in a joint, class, or collective action related to an employment, consumer, antitrust, or civil rights dispute.”<sup>131</sup> For these four categories of disputes, any predispute agreements that would bind parties to arbitration or waive the opportunity to participate in a class action are made unenforceable.<sup>132</sup> The Democratic Report justifies these four categories by explaining that they are expected to consist mainly of claims that would not be litigated in court without the availability of class actions.<sup>133</sup> Commentary about this bill has recognized that it is intended to give more people the ability to participate in litigation.<sup>134</sup>

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*Law Review*) (describing *AT&T Mobility v. Concepcion* as creating “major setbacks for individuals who may not have the resources to challenge big companies in court or through arbitration”).

128. Consumer Fin. Prot. Bureau, Consumer Financial Protection Bureau Study Finds That Arbitration Agreements Limit Relief for Consumers, [https://files.consumerfinance.gov/f/201503\\_cfpb\\_factsheet\\_arbitration-study.pdf](https://files.consumerfinance.gov/f/201503_cfpb_factsheet_arbitration-study.pdf) [<https://perma.cc/Y32N-N8GG>] (last visited Aug. 5, 2021). For the full report to Congress, see Consumer Fin. Prot. Bureau, Arbitration Study: Report to Congress, Pursuant to Dodd-Frank Wall Street Reform and Consumer Protection Act § 1028(a) (2015), [https://files.consumerfinance.gov/f/201503\\_cfpb\\_arbitration-study-report-to-congress-2015.pdf](https://files.consumerfinance.gov/f/201503_cfpb_arbitration-study-report-to-congress-2015.pdf) [<https://perma.cc/UL7T-8T7Q>].

129. H.R. Rep. No. 116-204, at 4–6 (2019).

130. *Id.* at 11–12 (citing the example of employers sexually harassing employees as a type of violation that is more likely to stop when publicly litigated).

131. H.R. 1423, 116th Cong. sec. 2 (2019).

132. *Id.* § 402(a).

133. H.R. Rep. No. 116-204, at 9–15.

134. See, e.g., Hugh Baran, End Forced Arbitration to Honor Justice Ginsburg’s Legacy, *Bloomberg L.* (Oct. 2, 2020), <https://news.bloomberglaw.com/daily-labor-report/end->

This time, it was Republicans who offered a reminder that there is an alternative way of understanding the purpose of class actions. The end of the Democratic Report includes the dissenting views of Republican Congressman Doug Collins, who was the Ranking Member of the House Judiciary Committee.<sup>135</sup> Congressman Collins largely disregards the Democrats' concern that many people who would participate in class actions do not participate in arbitration, and he instead focuses on whether those who participate in arbitration achieve greater compensation than those who participate in class actions.<sup>136</sup> Having adopted this criterion, he argues that arbitration is a "speedier, less expensive and more flexible means of dispute resolution than litigation."<sup>137</sup> For example, he argues that employees who engage in arbitration are more likely to prevail and likely to achieve greater compensation than employees who engage in litigation,<sup>138</sup> and that participating in arbitration is cheaper than going to court.<sup>139</sup> Less than a week after the Democratic Report was released, the administration of then-President Trump expressed the same views and indicated the FAIR Act would be vetoed if it were to pass Congress.<sup>140</sup> Like the Fairness Act, the FAIR Act passed the House of Representatives along partisan lines, this time with Democratic members voting 223-2 in favor and Republican members voting 2-183 opposed.<sup>141</sup> Also like the Fairness Act, it was never put up for a vote in the Senate and never became law.<sup>142</sup>

Democrats currently control both houses of Congress and the presidency, but it would be a mistake to assume they can now pass the FAIR Act without compromise. They are likely to encounter obstacles in the Senate, where they will face the prospect of a filibuster and cannot afford to lose

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forced-arbitration-to-honor-justice-ginsburgs-legacy/ (on file with the *Columbia Law Review*) ("The FAIR Act would, in short, restore workers' rights to collectively hold their employers accountable for lawbreaking before judges and juries."); Alexia Fernández Campbell, *The House Just Passed a Bill That Would Give Millions of Workers the Right to Sue Their Boss*, Vox (Sept. 20, 2019), <https://www.vox.com/identities/2019/9/20/20872195/forced-mandatory-arbitration-bill-fair-act/> [<https://perma.cc/CC2D-TNEV>] ("[The FAIR Act] would restore access to the courts to more than sixty million US workers.").

135. H.R. Rep. No. 116-204, at 29–45.

136. *Id.* at 32–44.

137. *Id.* at 30.

138. *Id.* at 42–44.

139. *Id.* at 32–34.

140. OMB, Exec. Off. of the President, Statement of Administration Policy: H.R. 1423—Forced Arbitration Injustice Repeal (FAIR) Act (Sept. 17, 2019), [https://trumpwhitehouse.archives.gov/wp-content/uploads/2019/09/SAP\\_HR-1423.pdf](https://trumpwhitehouse.archives.gov/wp-content/uploads/2019/09/SAP_HR-1423.pdf) [<https://perma.cc/D654-X4CW>] (stating that arbitration leads to "lower costs, faster resolution, and reduced burden on the judiciary" and that the FAIR Act would lead to more costly and inefficient litigation).

141. Roll Call 540, Clerk of the U.S. House of Representatives (Sept. 20, 2019), <https://clerk.house.gov/Votes/2019540> [<https://perma.cc/K7VN-FYUJ>].

142. The FAIR Act was introduced but never voted on in the Senate, which was under Republican control. S. 610, 116th Cong. (2019).

the votes of conservative Democratic senators.<sup>143</sup> It is worth remembering that Republicans were in a similar position during the 2017–2019 congressional term, yet the Fairness Act did not become law. The two parties are at an impasse.

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This Part's analysis of the Fairness Act and the FAIR Act shows that Republicans and Democrats are sharply divided over the goals of class actions. Republicans only believe in the goal of compensation, an efficiency goal. Democrats believe in the goals of access to justice and shaping laws and norms, thereby embracing both representation goals.

This implies there are two cleavages between the Republican view and the Democratic view. First, Republicans and Democrats disagree over whether class actions serve any public purpose: Republicans do not believe in any private goal while Democrats believe in the public goal of shaping laws and norms. As section I.B suggests, this cleavage over whether class actions should serve a public goal does not implicate any fundamental conceptual tension. If Republicans wake up tomorrow and start believing in the goal of monetary deterrence, a public goal, reconciling that goal with the goal of compensation would not raise any difficulties. The fact that Republicans do not believe in any public goal reflects their vision for a limited role for class actions. The fact that Democrats do believe in a public goal reflects their vision for a much larger role for class actions. As important as this cleavage is, it is not hard to find a middle ground.

More fundamentally, Republicans and Democrats disagree over the justification for class actions. Republicans favor the efficiency justification while Democrats favor the representation justification. As section I.B suggests, this cleavage raises a greater question over the compatibility of the Republican view and the Democratic view—whether it is reasonable to hold a combination of both views or find common ground between them. If there is any hope for compromise between Republicans and Democrats, it requires bridging the gap between the efficiency justification and the representation justification.

### III. A PATH FORWARD

This Part presents a path toward reconciling the goals of class actions discussed in this Note. As Part I explains, the goals of class actions are separated by a divide between two broad justifications for class actions, efficiency and representation. As Part II explains, a difference in views regarding the goals of class actions is contributing to an impasse between Republicans and

143. See Mark Kantor, What the U.S. Election Will Mean for Arbitration in the U.S., Mediate.com (Nov. 2020), <https://www.mediate.com/articles/uselectionarbitraion1.cfm> [<https://perma.cc/QPN4-E2GW>] (arguing that the 2020 election could not put Democrats in a position to pass the broad reforms to arbitration agreements encompassed in the FAIR Act).

Democrats over legislation related to class actions, and a central cleavage between the Republican view and the Democratic view is an underlying disagreement over whether the proper justification for class actions is efficiency or representation. This Part argues that the goals of class actions can, in fact, coexist in peace. Section III.A presents a framework for distinguishing between those class actions that are supposed to serve efficiency goals and those class actions that are supposed to serve representation goals. This reconciles the efficiency justification and the representation justification, showing that core principles of both can be sustained within a single analytical framework. Section III.B then provides examples of legislative compromises that can be built on this reconciled understanding of the goals of class actions and that may be palatable to both Republicans and Democrats.

#### A. *Reconciling the Goals of Class Actions*

This section presents a framework for determining whether class actions are primarily supposed to serve efficiency goals or representation goals. It demonstrates this framework by applying it to a securities fraud class action and a consumer class action. This framework has implications for the current impasse between Republicans and Democrats, which section III.B elaborates upon, but it has broader relevance as well. It resolves the deeper conceptual tension between the efficiency justification and the representation justification. The viability of this framework implies that the two justifications for class actions are compatible, and that it is consistent and reasonable to adopt a reconciled view of class actions that includes both efficiency goals and representation goals.

This framework rests on the proposition that, as a general matter, efficiency and representation are on equal footing as justifications for class actions. This Note has shown that it is typically assumed that either efficiency or representation is the more important justification for class actions, in both doctrinal<sup>144</sup> and political debates.<sup>145</sup> Yet efficiency and representation are both foundational procedural objectives.<sup>146</sup> They are inexorably tied together: If litigation becomes less efficient, justice becomes scarcer; if justice becomes scarce, it takes more resources to achieve the same just outcomes. It is also worth recalling Justice Story's comment that the class action "does not seem to be founded on any positive and uniform principle," as well as Lord Eldon's prioritization of the hybrid purpose of "convenient administration of justice."<sup>147</sup> These words counsel against any rigid assumption that, between efficiency and representation, one justification is generally more important than the other.

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144. See *supra* section I.B.

145. See *supra* Part II.

146. See, e.g., Fed. R. Civ. P. 1 (stating that the Federal Rules of Civil Procedure should be used "to secure the just, speedy, and inexpensive determination of every action and proceeding").

147. See *supra* notes 32–33 and accompanying text.

The framework offered by this section considers efficiency and representation to be on equal footing in the sense that neither of the two justifications *generally* predominates over the other, but it instead proposes that class treatment has different justifications and serves different goals in different contexts. This framework consists of two criteria. One criterion determines whether the primary *private* goal of a class action is compensation (an efficiency goal) or access to justice (a representation goal). The other criterion determines whether the primary *public* goal of a class action is monetary deterrence (an efficiency goal) or shaping laws and norms (a representation goal). Sometimes a criterion may indicate that a class action has a mix of two private goals or a mix of two public goals. Nonetheless, it is usually possible to determine that such a criterion leans one way more than the other.

The private criterion considers whether the goal of a class action from the perspective of class members is increasing compensation or providing access to justice. This criterion asks what proportion of the relief is directed at claimants who might have achieved compensation without the class action, and what proportion is directed at claimants who would not have received any compensation without the class action. The more relief is directed at those who might have received compensation without the class action, the more the class action's primary private goal is to increase compensation, which is an efficiency goal. The more relief is directed at those who would *not* have been compensated without the class action, the more the class action's primary private goal is to provide access to justice, which is a representation goal. The main question that guides the determination of the private criterion is how much of the relief is sought by class members with valuable claims and how much is sought by class members with nonvaluable claims.

The public criterion considers whether the goal of a class action from the perspective of the broader public is to provide monetary deterrence or to shape laws and norms. This criterion asks which of these effects has greater potential to prevent future violations similar to the one the defendant is alleged to have committed. Deterring violations through monetary penalties is an efficiency goal, while shaping laws and norms prohibiting violations is a representation goal. The main question that guides the determination of the public criterion is whether the defendant's violation resulted more from perverse monetary incentives or more from underdeveloped legal or ethical norms.

For most class actions, these two criteria lead to an ultimate conclusion as to whether the class action is primarily supposed to serve efficiency goals or representation goals. A class action may be described as "efficient" if it is primarily supposed to serve the goals of compensation and monetary deterrence, which are associated with the efficiency justification. A class action may be described as "representational" if it is primarily supposed to serve the goals of providing access to justice and shaping laws and norms,

which are associated with the representation justification. Even class actions that have a mix of efficient and representational qualities can usually be identified as being mostly efficient or mostly representational.

Of course, these criteria offer an analytical framework, not a precise dividing line.<sup>148</sup> A criterion will sometimes result in a mixed determination. When that happens, the other criterion may still provide guidance. If the two criteria point in opposite directions, one suggesting the class action is efficient and the other suggesting it is representational, one may break the tie by asking whether the relevant private goal or the relevant public goal is more salient.

The rest of this section demonstrates that this framework is workable by applying it to two class actions, a securities fraud class action and a consumer class action. The legal claims in these examples are common among these categories of class actions. As is typical, both class actions ended in settlements.<sup>149</sup> These examples are analyzed using only the kinds of information and inferences that are readily available to courts.

1. *Example: A Securities Fraud Class Action.* — This section's framework for distinguishing between efficient and representational class actions is first demonstrated through an analysis of a securities fraud class action, *In re BHP Billiton Ltd. Securities Litigation*.<sup>150</sup> *Billiton* had a mix of two private goals, compensation and access to justice, as the class included a mix of claimants who would have litigated their claims without a class action and claimants who would not have done so. Thus, the private criterion results in a mixed determination. The public goal of *Billiton* was monetary deterrence, a goal aligned with the efficiency justification. This leads to a conclusion that while *Billiton* included a mix of efficient and representational elements, it was probably more efficient than representational. This analysis of *Billiton* also demonstrates that this section's framework can provide guidance even when one of the criteria results in a mixed determination.

*Billiton* arose out of the collapse of a dam at an iron ore mining complex in Brazil, a disaster that killed nineteen people, injured many others, and caused extensive property and environmental damage.<sup>151</sup> The dam was owned and operated by Samarco Mineração (Samarco), a Brazilian company of which BHP, a large energy company, was fifty-percent owner.<sup>152</sup> The class

148. A more precise dividing line would not necessarily be a more accurate one. For an example of a dividing line between efficient and representational class actions that is more precise but less accurate than the complete framework presented in this section, see *infra* section III.B.2.

149. See *infra* notes 155, 172–173 and accompanying text.

150. 276 F. Supp. 3d 65 (S.D.N.Y. 2017).

151. *Id.* at 70–71.

152. *Id.* at 70. BHP is dual listed but operates as a unified business entity with a single board of directors and management team. *Id.* at 70. BHP is comprised of two corporate entities, which were named BHP Billiton Limited and BHP Billiton Plc at the time. *Id.* These have since been renamed to BHP Group Limited and BHP Group Plc, respectively. Press Release, Change of Name to BHP Group, BHP (Nov. 20, 2018), <https://www.bhp>.

action was brought against BHP by its investors, who alleged that BHP was aware of increasingly dire warnings that the dam might burst.<sup>153</sup> Claims were brought under Section 10(b) of the Securities Exchange Act of 1934 and SEC Rule 10b-5, which provide a cause of action when a defendant knowingly misrepresents or omits information that is material to investors, where relying on those misrepresentations or omissions causes investors economic loss.<sup>154</sup> The trial court agreed that certain statements by BHP gave rise to liability under Section 10(b) and Rule 10b-5, including the statement “[w]e maintain a relentless focus on the health and safety of our people and the communities in which we operate,” as well as various statements downplaying the toxicity of the mudflow released by the dam’s collapse.<sup>155</sup> *Billiton* resulted in a \$50 million settlement.<sup>156</sup>

The *Billiton* class included a fair mix of class members who might have been compensated even without the class action and those who would not have been compensated without the class action. If a court were to explore whether some of the class members had valuable claims, it might start by considering the class members who applied to be lead plaintiff. In a securities fraud class action, the role of lead plaintiff is presumptively reserved for the class member with the greatest financial interest in the litigation.<sup>157</sup> The class member who was appointed lead plaintiff in *Billiton* had a claim of \$473,000; other class members who filed unsuccessful motions seeking to be appointed lead plaintiff had claims of \$114,000, \$107,000, \$80,000, \$60,000, \$44,000, and \$32,000 (all amounts rounded to the nearest thousand).<sup>158</sup> It can be assumed that at least some of these are valuable claims

com/media-and-insights/news-releases/2018/11/change-of-name-to-bhp-group/ [https://perma.cc/E6AF-8N3X].

153. *Billiton*, 276 F. Supp. 3d at 72–74, 77.

154. *Id.* at 77–78. For a class action proceeding under Section 10(b) and Rule 10b-5, it is not necessary to show that all members of the class knew about and actually relied on a misleading statement. *Halliburton Co. v. Erica P. John Fund, Inc.*, 573 U.S. 258, 277–78 (2014). This is based on the fraud-on-the-market theory, which assumes that public and material information is incorporated into the price of a security in an efficient market, and that any investor who buys or sells stock at the market price relies on the integrity of that price. *Id.* at 268.

155. *Billiton*, 276 F. Supp. 3d at 80, 84–86.

156. *In re BHP Billiton Sec. Litig.*, No. 1:16-cv-01445-NRB, 2019 WL 1577313, at \*1 (S.D.N.Y. Apr. 10, 2019), *aff’d sub nom.*, *City of Birmingham Ret. & Relief Sys. v. Davis*, 806 F. App’x 17 (2d Cir. 2020).

The \$50 million settlement amount is in the ninetieth percentile among securities class action settlements in 2019. Cornerstone Rsch., *Securities Class Action Settlements: 2019 Review and Analysis* 19 (2020), <https://www.cornerstone.com/Publications/Reports/Securities-Class-Action-Settlements-2019-Review-and-Analysis.pdf> [https://perma.cc/2NY2-XTFZ].

157. 15 U.S.C. § 78u-4(a)(3)(B)(iii)(I) (2018).

158. Order at 5, *In re BHP Billiton Sec. Litig.*, No. 1:16-cv-01445-NRB, 2019 U.S. Dist. LEXIS 63598 (S.D.N.Y. June 14, 2016), ECF No. 11 (noting that the class member with the greatest financial stake among those who had sought to be lead plaintiff had claimed losses of \$473,049.63, and that a different class member had claimed losses of \$43,618.80); Declaration of Jeremy A. Lieberman in Support of Motion of Richard Frechman and James Crumpley exh. C, at 2, *Billiton*, 276 F. Supp. 3d 65 (No. 1:16-cv-01445-NRB), ECF No. 33-3 (indicating that a

and that some of these claimants would have sued BHP even without a class action. For example, these claimants and other large claimants might have brought a lawsuit by relying on traditional joinder. Moreover, the fact that these claimants volunteered to be the lead plaintiff indicates their willingness to actively litigate against BHP. It may also be readily assumed, however, that there were many small investors in BHP, as is always the case for publicly traded companies. These small investors presumably had non-valuable claims and would not have been compensated in the absence of the class action. The private criterion therefore leads to a mixed determination: *Billiton* was primarily efficient to a small number of class members with large claims, but it was primarily representational to a large number of class members with small claims.<sup>159</sup>

While the private criterion results in a mixed determination, the public criterion indicates that *Billiton* was an efficient class action. If *Billiton* provided a benefit to the public, it did so through monetary deterrence rather than by clarifying laws or norms in a way that might prevent misbehavior. BHP's negligence in maintaining the dam, besides being obvious from the facts, had already led Brazilian prosecutors to charge BHP and Samarco executives with involuntary manslaughter and to bring a \$43 billion civil lawsuit.<sup>160</sup> The addition of this class action by BHP's investors—who were not the primary victims of the incident, having been nowhere near the dam's mudflow—was not necessary for further establishing the wrongfulness of BHP's negligence. One would also be hard-pressed to argue that the class action was necessary as a reminder that companies must not misrepresent information that is material to investors. Eighty-seven percent of non-M&A federal securities class actions filed in 2019 included

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prospective lead plaintiff has a stake of \$32,179); Declaration of Michael W. Stocker in Support of the Motion of the Town of Jupiter Police Officers' Retirement Fund exh. B, at 2, *Billiton*, 276 F. Supp. 3d 65 (No. 1:16-cv-01445-NRB), ECF No. 27-2 (indicating that a prospective lead plaintiff has a stake of \$80,192.92); Declaration of Reed R. Kathrein in Support of Motion exh. 3, at 2, *Billiton*, 276 F. Supp. 3d 65 (No. 1:16-cv-01445-NRB), ECF No. 38-3 (indicating that a prospective lead plaintiff has a stake of \$113,565.32); Declaration of Richard W. Gonnello in Support of Richard and Sandra Michael's Motion exh. 4, at 2, *Billiton*, 276 F. Supp. 3d 65 (No. 1:16-cv-01920-NRB), ECF No. 10-4 (indicating that a prospective lead plaintiff couple has a stake of \$107,051.15); Memorandum of Law in Support of Motion of Thomas O'Reilly exh. 3, at 2, *Billiton*, 276 F. Supp. 3d 65 (No. 1:16-cv-01445-NRB), ECF No. 20-3 (indicating that a prospective lead plaintiff has a stake of \$59,773.44).

159. It may nonetheless be possible to determine which way the private criterion leans if one makes additional analytical choices that build on the foundational framework presented here. Such an analysis might seek to measure how much of the relief is sought by claimants with valuable claims and how much is sought by claimants with nonvaluable claims. For example, one could define a threshold dollar amount that is assumed to separate valuable claims and nonvaluable claims, and then decide how to weigh the dollar value of relief in each category. This way, one can arrive at percentages that can be assumed to represent the extent to which the class action is efficient and the extent to which it is representational under the private criterion.

160. *Billiton*, 276 F. Supp. 3d at 81, 91.

a Rule 10b-5 cause of action similar to that of *Billiton*.<sup>161</sup> Given the lack of novelty in the legal claims, *Billiton* did little to advance legal precedent or to clarify legal or ethical norms in a new factual context.

Cases such as *Billiton* are far more likely to provide a public benefit by imposing an added monetary deterrent against misbehavior. BHP and Samarco had sufficient warning to realize they were causing a level of risk that was unlawful and unethical.<sup>162</sup> Yet they did not change course because of a profit motive: In fact, BHP increased production in the year prior to the dam's collapse in order to maintain profitability, thereby causing the dam to receive more waste, even as warnings that it might not hold were growing more dire.<sup>163</sup> While BHP's actions were deeply irresponsible, the company showed at least a semblance of rationality. Samarco's board, which included BHP executives, carefully assessed the risks presented by the dam over the course of three years prior to the dam's collapse and stressed the importance of both safety and cost reduction.<sup>164</sup> These actions suggest that even while BHP was unresponsive to legal and ethical norms, it was still responsive to basic monetary incentives. It is entirely possible that imposing a \$50 million penalty on BHP, and similar penalties in analogous situations, will sometimes change the calculus of actors such as BHP. Thus, the public criterion, which asks by what mechanism the class action is more likely to provide a public benefit, suggests that *Billiton* operated through monetary deterrence, an efficiency goal. If one assumes that *Billiton*'s public goal was at least as salient as its two private goals, one can conclude that *Billiton* was mostly an efficient class action.

2. *Example: A Consumer Class Action.* — This section's framework for distinguishing efficient and representational class actions is next demonstrated through an analysis of a consumer class action, *Klee v. Nissan North America, Inc.*<sup>165</sup> The private goal of *Klee* was to provide access to justice, as all the relief was directed at claimants who would have been unlikely to be compensated without a class action. The public goal was to shape laws and norms. Since these are both goals aligned with the representation justification, *Klee* is found to be a representational class action.

*Klee* concerned the original model of the Nissan Leaf.<sup>166</sup> When it was introduced a decade ago, the Leaf was described by some as the first mass-

161. Cornerstone Rsch., Securities Class Action Filings: 2019 Year in Review 10 (2020), <https://www.cornerstone.com/Publications/Reports/Securities-Class-Action-Filings-2019-Year-in-Review.pdf> [<https://perma.cc/V8M2-RCVM>].

162. *Billiton*, 276 F. Supp. 3d at 73–74 (noting that, in the two years prior to the collapse, Samarco executives were informed that cracks were appearing in the dam and that monitoring equipment indicated “emergency” levels of pressure and stress on the dam).

163. *Id.* at 72–73.

164. *Id.* at 74–76.

165. No. CV 12-08238 AWT (PJWx), 2015 WL 4538426 (C.D. Cal. July 7, 2015).

166. *Id.* at \*1.

market electric car.<sup>167</sup> The experience of driving a Leaf was greatly dependent on its battery capacity, which determined how far the car could go before needing to be charged.<sup>168</sup> A class of owners and lessees of 2011 and 2012 Leaf models alleged that Nissan had misrepresented the battery capacity of these models, claiming the Leaf's battery capacity sometimes degraded significantly over time.<sup>169</sup> The parties initially agreed to a proposed settlement under which Nissan would repair or replace batteries that fell below a capacity of approximately seventy percent.<sup>170</sup> Then the case made headlines due to an objection filed by then-Chief Judge Alex Kozinski of the Ninth Circuit, the circuit in which the case was being adjudicated, and his wife, who objected to the proposed settlement in their capacity as owners of a 2011 Nissan Leaf and members of the class.<sup>171</sup> The initial settlement was not approved, and the parties, along with Chief Judge Kozinski, engaged in mediation.<sup>172</sup> They ultimately reached a settlement in which Nissan agreed to *replace* the battery with a newer battery model, not merely to repair the battery, if the capacity fell below the threshold level.<sup>173</sup> Nissan also provided class members with ninety days of free charging at charging stations or, for class members who could not participate in this program, payments of \$50.<sup>174</sup>

167. David Gluckman, 2011 Nissan Leaf SL, Car & Driver (Aug. 25, 2011), <https://www.caranddriver.com/reviews/a15124059/2011-nissan-leaf-sl-long-term-road-test-review/> [<https://perma.cc/2C7S-QHBP>].

168. *Id.* (discussing concerns over the Leaf's driving range, ways to extend its battery range, and how to plan battery-friendly driving routes).

169. *Klee*, 2015 WL 4538426, at \*1.

170. *Id.*

171. Objection to Plaintiffs' Motion for Final Approval of Class Action Settlement, *Klee v. Nissan N. Am., Inc.*, No. 2:12-cv-08238-BRO-PJW (C.D. Cal. Nov. 10, 2013), 2015 WL 4538426. Chief Judge Kozinski and his wife argued that the plaintiffs' counsel had not done due diligence to demonstrate that the proposed settlement was a good deal for the class, and that their valuation of the settlement was speculative. *Id.* at \*1–7, \*18–22. In particular, they argued that the settlement took credit for inducing Nissan to make changes to its warranty, when in fact Nissan would have made those changes even in the absence of the class action in order to “quell consumer complaints.” *Id.* at \*9–12. They claimed that the proposed settlement was “worthless.” *Id.* at \*24.

Chief Judge Kozinski's objection received extensive coverage in the legal press. See, e.g., Debra Cassens Weiss, Electric-Car Owner Alex Kozinski Offers “Scathing” Objection in Class Action, ABA Journal (Nov. 21, 2013), [https://www.abajournal.com/news/article/nissan\\_leaf\\_owner\\_alex\\_kozinski\\_is\\_scathing](https://www.abajournal.com/news/article/nissan_leaf_owner_alex_kozinski_is_scathing) [<https://perma.cc/3ZR7-9FLB>]; see also N.Y.U. Sch. of L., The Future of Class Action Litigation: Keynote by Chief Judge Alex Kozinski, YouTube (Nov. 11, 2014), <https://youtu.be/zipvHeC42Lw> (on file with the *Columbia Law Review*) (Chief Judge Kozinski discussing his objection in *Klee*). Judge Kozinski stepped down from the federal judiciary in 2017 following accusations of sexual harassment. Niraj Chokshi, Federal Judge Alex Kozinski Retires Abruptly After Sexual Harassment Allegations, N.Y. Times (Dec. 18, 2017), <https://www.nytimes.com/2017/12/18/us/alex-kozinski-retires.html> (on file with the *Columbia Law Review*).

172. *Klee*, 2015 WL 4538426, at \*2.

173. *Id.*

174. *Id.*

The *Klee* class appears to have consisted of class members with non-valuable claims, who were unlikely to be compensated outside the class action. The class members were current or former U.S. owners and lessees of 2011 and 2012 models of the Nissan Leaf<sup>175</sup>—a class of approximately 19,000.<sup>176</sup> Unlike in *Billiton*, the claims were quite uniform in size, as those class members who had experienced degraded battery performance had presumably suffered approximately the same scale of injury. These injuries had already been mitigated prior to the settlement: Independently of the class action, Nissan had enhanced its warranty to provide battery repairs, though not necessarily battery replacements, to customers who experienced degraded battery performance.<sup>177</sup> This suggests that the value of the settlement was relatively limited for most class members. Even if some class members would not have received repairs or other support from Nissan without the settlement, an upper bound for the value the settlement provided them was the cost of battery replacement, which was estimated to be \$6,500 by the plaintiffs' expert witness.<sup>178</sup> Even at that maximum amount, it is questionable whether a typical claimant would seek compensation outside the class action, whether through independent litigation, joinder, or an alternative dispute resolution mechanism. *Klee* offers no reason to believe that any class members had larger individual claims than that. Even if there were a small number of class members who would have pursued their claims, they were a small minority. Thus, the private criterion, which considers the purpose of the class action from the standpoint of class members, indicates that *Klee* was a representational class action.

It is not clear that *Klee* provided any meaningful public benefit through monetary deterrence. While the plaintiffs valued the settlement at \$24 million, the trial court found this valuation to be "nothing more than pure speculation."<sup>179</sup> The value of the settlement is especially difficult to estimate because Nissan was willing to make concessions to frustrated customers even in the absence of a settlement.<sup>180</sup> Thus, even when the settlement is considered in the aggregate, it is reasonable to speculate that much of the relief supposedly provided by the settlement simply codified actions that Nissan was already going to take.<sup>181</sup> Indeed, with the benefit of hindsight, replacing defective batteries for free appears to have been a wise investment in the goodwill of customers who placed their faith in the pioneering 2011 and 2012 models of the Leaf, as the Leaf later achieved cumulative sales of over 450,000, and for several years it was the best-selling electric car of all

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175. *Id.* at \*5.

176. *Id.* at \*3 ("Plaintiffs originally estimated the number of eligible class members to be 18,588, and notice was ultimately sent to 19,332 class members.").

177. *Id.* at \*1–2.

178. *Id.* at \*10.

179. *Id.*

180. *Id.* at \*1–2.

181. Chief Judge Kozinski had raised a similar point in his objection to the original proposed settlement. See *supra* note 171.

time.<sup>182</sup> Given the speculative value of the settlement and the possibility that it contained relief that Nissan would have offered voluntarily, *Klee*'s role in providing monetary deterrence is uncertain at best.

It is far more likely that *Klee* provided a public benefit by clarifying legal and ethical norms pertaining to electric car batteries and warranties. Nissan's alleged violation had occurred in a context where such norms were underspecified—a problem that a class action such as *Klee* can help remedy. Given the pioneering state of electric cars at the time, the public was undecided on what expectations should be placed on electric car manufacturers. Early reviews of the Nissan Leaf described the capacity and longevity of its battery as an area of concern, yet they did so without clearly assigning blame to Nissan by, for example, accusing it of producing a seriously defective car or deliberately misleading its customers.<sup>183</sup> Over time, industry publications described growing frustration with Nissan and began to reference the fact that a class action was moving forward.<sup>184</sup> Even though *Klee* did not actually result in a finding of legal liability,<sup>185</sup> it gave voice to consumers and provided a public forum for them to hold Nissan accountable. Moreover, this is a context where such public accountability matters, as buyers of electric cars are likely to do careful research. Since Nissan and other car manufacturers have a strong interest in maintaining a positive public image in order to sell cars, they tend to react relatively conscientiously when faced with class actions such as *Klee*. As a result, both the private criterion and the public criterion indicate that *Klee* was a representational class action.

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The examples of *Billiton* and *Klee* demonstrate the workability of this framework for identifying class actions as being efficient or representational.

182. Maximilian Holland, Tesla Passes 1 Million EV Milestone & Model 3 Becomes All Time Best Seller, *CleanTechnica* (Mar. 10, 2020), <https://cleantechnica.com/2020/03/10/tesla-passes-1-million-ev-milestone-and-model-3-becomes-all-time-best-seller/> [<https://perma.cc/7XKT-KQS6>] (noting that the Nissan Leaf achieved 450,000 in cumulative sales before being surpassed by the Tesla Model 3 as the all-time best-selling electric car in late 2019 or early 2020).

183. See, e.g., Gluckman, *supra* note 167 (“[F]ear extends to and permeates the ownership experience. You’re afraid you won’t make it to the next electrical outlet, afraid of having to take a charge-sapping detour to buy milk, afraid to turn on accessories like the climate control or the radio.”).

184. See, e.g., Jeff Cobb, Nissan Leaf Owners Fear the Worst, Hope for the Best, *GM-Volt* (Aug. 21, 2012), <https://www.gm-volt.com/threads/nissan-leaf-owners-fear-the-worst-hope-for-the-best.336996/> [<https://perma.cc/Q8PA-RC72>]; Stephen Edelstein, Nissan Leaf Battery Capacity Lawsuit: Court Approves Settlement, *Green Car Reps.* (July 20, 2015), [https://www.greencarreports.com/news/1099200\\_nissan-leaf-battery-capacity-lawsuit-court-approves-settlement](https://www.greencarreports.com/news/1099200_nissan-leaf-battery-capacity-lawsuit-court-approves-settlement) [<https://perma.cc/2JZD-LKCF>]; US: Class Action Proposed on Nissan Leaf Batteries, *Auto. World* (Oct. 3, 2012), <https://www.automotiveworld.com/articles/96318-us-class-action-proposed-on-nissan-leaf-batteries/> [<https://perma.cc/4YJS-73PB>].

185. Because the parties agreed to a settlement prior to class certification, the court's approval only required it to consider whether the class should be certified and whether the settlement was fair. *Klee*, 2015 WL 4538426, at \*3. The court also expressed reservations about how strong the plaintiffs' case would be if it proceeded to trial. *Id.* at \*6.

This framework implies that it is consistent and reasonable to adopt a reconciled view of class actions. Under such a view, one need not choose between the efficiency justification and the representation justification, and one may subscribe to goals associated with both justifications. This framework can also be useful to courts seeking a more expansive understanding of the policy interests behind class actions. The following section goes a step further, arguing that this framework can potentially guide legislators toward compromise.

#### B. *Searching for Compromise in Class Action Legislation*

The reconciled view of class actions has many possible implications for the political and legislative battle over class actions. To begin with, it urges the two sides to stop speaking at cross-purposes when debating whether class actions are working. For example, Republicans believe class actions are not working based on arguments that they fail at the goal of compensation,<sup>186</sup> yet they tend to disregard the question of *who* is in the class. Republican arguments often proceed by comparing the average compensation of claimants in arbitration to the average compensation of claimants in class actions.<sup>187</sup> Under the reconciled view of class actions, this comparison is sensible for claimants who have sufficiently large claims to engage in arbitration, but not for small claimants for whom it may not be worthwhile to engage in arbitration, as access to justice remains their first priority. Democrats, on the other hand, believe class actions should be strengthened based on arguments that they succeed at providing access to justice, as they are capable of representing larger numbers of people than arbitration.<sup>188</sup> Under the reconciled view of class actions, including more people in class actions without regard to their compensation is more appropriate for representational class actions than for efficient class actions. Democrats can make their line of argument most persuasive if they apply it to those categories of class actions that bring important *new* grievances to light and prevent misbehavior by shaping laws and norms.<sup>189</sup>

This section proposes that the reconciled view of class actions might also provide a path for Republicans and Democrats to compromise on

186. See *supra* notes 92–94 and accompanying text.

187. See, e.g., *supra* notes 135–139 and accompanying text.

188. See *supra* note 126 and accompanying text.

189. As a contrary example, one can argue that securities fraud class actions proceeding under Rule 10b-5 tend to be efficient rather than representational. Under the public criterion described in section III.A, these class actions tend not to be representational because they are repetitive, bringing the same legal claims in relatively similar factual contexts, such that there are likely far more securities fraud class actions than necessary to maintain legal and ethical norms against misleading investors. See *supra* notes 154, 161 and accompanying text. This implies that it may not be valuable to offer more plaintiffs “access to justice” through such securities fraud class actions when the plaintiffs are not reasonably compensated. This line of reasoning does not exclude the possibility that securities fraud class actions can be justified on the grounds that they are useful for compensating investors and increasing monetary deterrence against misbehavior.

class action reform legislation. This is a bold claim. After all, Republicans and Democrats disagree not only over the goals of class actions but also over whether class actions are working—in essence, they disagree over whether class actions are mostly bad or mostly good.<sup>190</sup> Given these politics, any path to compromise is narrow. And yet the reconciled view of class actions can help devise give-and-take compromises that are potentially profitable to both sides. Given that Republicans only believe in the goal of compensation and do not recognize any public goal, these compromises must primarily mediate between the two private goals: compensation and access to justice. This section offers two examples of such compromises. The first example focuses on the incentives for bringing class actions, imagining a legislative compromise that would guide courts on how to determine attorney's fees. The second example focuses on constraints placed on class actions, imagining a legislative compromise that borrows ideas from both the Fairness Act and the FAIR Act, while appropriately targeting provisions at either efficient or representational class actions.

1. *Regulating Attorney Incentives.* — Neither side of the current debate over class actions can be satisfied with the current approach to calculating fees for class action plaintiff's attorneys—really, the current lack of any coherent approach. Attorney's fees are important because they provide the incentives to invest in class litigation. Those incentives should presumably be calibrated according to one's understanding of the goals of class actions and the effectiveness of class actions at achieving those goals. Currently, courts most often calculate attorney's fees based on a percentage of the class recovery.<sup>191</sup> When courts follow this method, they face a choice over what percentage to use. If courts find the percentage method to be inadequate, they sometimes rely on the lodestar amount, which pays attorneys according to hours worked and a reasonable hourly rate.<sup>192</sup> Sometimes, courts employ a mixed method known as a "lodestar cross-check," which involves calculating a percentage of the recovery, checking against the lodestar method, and adjusting the award if the "lodestar multiplier" is viewed as excessive.<sup>193</sup>

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190. See *supra* notes 91, 122–124 and accompanying text.

191. In one four-year study, the percentage method was used in 53.6% of class actions, while a mix of the percentage method and the lodestar method was used in 38.2% of class actions. Eisenberg et al., *supra* note 104, at 945.

192. See Manual for Complex Litigation (Fourth) § 21.71 (2004) (noting that "the court's task is easiest when class members are all provided cash benefits," but courts sometimes use the lodestar method because the benefit to the class is "speculative" or consists of injunctive or declaratory relief and "the value of such relief cannot be reliably determined or estimated").

193. See, e.g., *Hall v. Child's Place Retail Stores, Inc.*, 669 F. Supp. 2d 399, 400, 404–05 (S.D.N.Y. 2009) (finding that a requested fee award of \$3,240,000, which was twenty-seven percent of the settlement, was unreasonable because it resulted in a 3.75 lodestar multiplier, and instead approving a "reasonable" award of \$1,800,000, which was fifteen percent of the settlement and resulted in a 2.08 lodestar multiplier).

The lodestar cross-check is another opportunity for judges to apply discretion, as they may accept a greater or lesser lodestar multiplier based on the quality of work the plaintiff's

In summary, the total compensation of the class is the most important guidepost for determining attorney's fees, but courts have extraordinary leeway. To Republicans, the problem with the status quo is that, aside from judicial discretion, there are few constraints on attorney's fees, which Republicans view as being generally excessive.<sup>194</sup> Democrats should not be happy with the status quo either: As long as the total compensation of the class is the main guidepost for determining fee amounts, representation goals will often be undervalued. Under the reconciled view of class actions, one can imagine a compromise that takes steps to ease both concerns.

To alleviate Republican concerns, Congress could introduce limits on attorney's fees relative to compensation. These limits should be graduated according to per-claimant compensation. As an illustration, Congress might choose to cap attorney's fees at fifteen percent of the first \$10,000 in relief per claimant, ten percent for any relief per claimant in excess of \$10,000 and up to \$100,000, and five percent for any relief per claimant in excess of \$100,000. Such a graduated approach would be sensible under the reconciled view of class actions for two reasons. First, it makes the most sense to tie attorney's fees to compensation in the context of efficient class actions, for which compensation is an apt measurement of the private value of the class action. Since class actions that consist of claimants with larger compensation amounts are most likely to be efficient class actions, it is appropriate that such class actions would be subject to the most stringent limits under the graduated approach. Second, the attorney's contribution to the compensation achieved by the class should be understood relative to how much compensation claimants might have received in the absence of class litigation. Compensation awarded to large claimants may be greater than the compensation they would have achieved on their own, but compensation awarded to small claimants would not have otherwise been obtained at all. For example, a hundred class members who received a million dollars each presumably had valuable claims and would have been compensated without a class action, but a million class members who receive a hundred dollars each probably had nonvaluable claims and would have received nothing without a class action.

In exchange, Congress could also take modest steps to recognize that attorneys should sometimes be rewarded for providing access to justice to class members who do not end up receiving meaningful compensation. Under the reconciled view of class actions, this is appropriate in the context of representational class actions. Congress can provide a framework for courts to award fees in such cases, while recognizing that judicial discretion must play a significant role. First, the court can be required to assess whether the class action is representational, following an analysis such

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attorneys did or amount of the risk they took on. See, e.g., *Wal-Mart Stores, Inc. v. Visa U.S.A., Inc.*, 396 F.3d 96, 121 (2d Cir. 2005) ("Courts in their discretion may increase the lodestar by applying a multiplier based on factors such as the riskiness of the litigation and the quality of the attorneys.").

194. See *supra* notes 97–99 and accompanying text.

as the one section III.A.2 describes. Second, if the class action is representational, the court can be permitted to determine a per-class-member dollar amount that represents the degree of grievances suffered by the class members and the extent that the class action served as an effective public forum for adjudicating these grievances. The dollar amount can be capped at some amount per claimant, such as \$50. This total dollar amount can be used as a supplement to actual compensation for the purpose of calculating attorney's fees.

2. *Balancing Compensation and Access to Justice.* — One can potentially view the Fairness Act and the FAIR Act as containing reasonable ideas but extending those ideas beyond their proper scope. Republicans say class actions are deviating from the goal of compensation. That is why, for example, one provision of the Fairness Act would require plaintiffs to demonstrate, prior to class certification, that there is “a reliable and administratively feasible mechanism . . . for distributing directly to a substantial majority of class members any monetary relief secured for the class.”<sup>195</sup> The problem with this provision is that it would not only apply to efficient class actions, which are most associated with the goal of compensation, but would also undermine representational class actions by increasing the difficulty of pursuing class actions consisting of nonvaluable claims.<sup>196</sup> On the other hand, Democrats wish to increase the availability of class actions in order to further representational goals—namely, to expand access to justice and to better shape laws and norms against misbehavior.<sup>197</sup> For this reason, the FAIR Act would render unenforceable any predispute agreements that waive the opportunity to participate in class actions for employment, consumer, antitrust, and civil rights disputes.<sup>198</sup> But this provision would increase not only the number of representational class actions, which are most associated with the representational goals Democrats have in mind, but also the number of efficient class actions.

Under the reconciled view of class actions, perhaps a path to compromise is to channel each provision toward the class actions that its underlying rationale is most applicable to. That is, perhaps Republican ideas for enforcing the compensatory purpose of class actions should be targeted at efficient class actions, and Democratic ideas of expanding access to justice should be targeted at representational class actions.

To draw an approximate line between efficient class actions and representational class actions, Congress could define a threshold amount of monetary relief per class member, such that it can be assumed that class members obtain access to justice by pursuing claims below that amount, whereas giving a class member relief in excess of that amount can be as-

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195. H.R. 985, 115th Cong. §1718(a) (2017).

196. See *supra* note 114 and accompanying text.

197. See *supra* notes 124–126, 129–130 and accompanying text.

198. H.R.1423, 116th Cong. (2019).

sumed to serve a compensatory purpose. Defining such a threshold inherently involves a significant degree of arbitrariness, and it is an exercise that only Congress can undertake. It can be a relatively low amount, such as \$50, or it can be a higher amount. To the extent that class actions provide relief below the threshold amount per class member, they can be assumed to serve a representational purpose; to the extent they exceed the threshold amount, they can be assumed to serve an efficient purpose. While this method is far from perfect, it is a step toward separating efficient and representational class actions.<sup>199</sup>

Congress can design a compromise around such a threshold. To the extent that class actions achieve relief for class members above the threshold amount, they might be held to a compensatory goal. To the extent that class actions achieve relief for class members below the threshold amount, relief might be allowed regardless of arbitration agreements. Thus, a compromise might consist of the following provisions (assuming, for the purpose of illustration, that Congress sets the threshold at \$50):

(1) Prior to federal courts certifying a class action seeking monetary relief, the party seeking to maintain the class action must demonstrate that there is a reliable and administratively feasible mechanism for the distribution of any monetary relief in excess of [\$50] per class member directly to a substantial majority of class members entitled to such amounts of relief.

(2) No predispute arbitration agreement or predispute joint-action waiver shall be valid or enforceable with respect to claims for monetary relief up to [\$50] per class member with respect to an employment dispute, consumer dispute, antitrust dispute, or civil rights dispute.

Such a compromise would require Congress to weigh many questions. To Republicans, revoking the applicability of mandatory arbitration provisions up to the threshold amount raises fears of increasing the number of class actions. Yet the number and size of those class actions will be constrained by the threshold amount, and in exchange, Republicans will go a long way toward addressing their concerns over inadequate compensation and excessive attorney's fees by regulating above the threshold amount. Democrats may fear that the threshold will cut into the ability of class actions to provide access to justice. And yet the threshold amount will still permit class actions to be brought, even if there are arbitration agreements, if the class is sufficiently large. Of course, opponents of mandatory arbitration agreements take the view that they deserve to be invalidated more generally.<sup>200</sup> Ideally, Congress should take these warnings seriously.

199. As section III.A explains, the public criterion for determining whether a class action is compensatory or representational analyzes the public effect of the class action. This criterion is not captured by the threshold approach.

200. Some would argue that such agreements are not rationally assessed by people who sign them. See, e.g., Russell Korobkin, Bounded Rationality, Standard Form Contracts, and Unconscionability, 70 U. Chi. L. Rev. 1203, 1206–07 (2003) (arguing that buyers do not consider all contract terms, so that sellers are incentivized to provide low-quality attributes

Still, the compromise presented here might be more realistic given the current politics of both sides: It brings some small claimants back into the courtroom, yet it also allows mandatory arbitration agreements to keep much of their vitality by capping per-claimant compensation amounts. Both sides must give something up, but in exchange, both sides get much of what they want.

#### CONCLUSION

After fifty years of conflict, perhaps healing begins with the various factions of the class action war understanding one another. To that end, this Note has described a taxonomy of the goals of class actions. These goals are organized around a fundamental question of whether class actions are justified by efficiency or representation. The efficiency justification is associated with a private goal of compensation and a public goal of increasing monetary deterrence against misbehavior. The representation justification is associated with a private goal of providing access to justice and a public goal of advancing legal and ethical norms. A vast body of legal doctrine and commentary has upheld certain goals over others, often siding with one justification over the other. Polarization has also taken hold of the political debate over class actions. Republicans only believe in the goal of compensation, which is associated with the efficiency justification, while Democrats believe in both representational goals. Neither Republicans nor Democrats are likely to pass significant reforms without compromise.

This Note has argued that the goals of class actions can be reconciled. It has advanced a framework that places the efficiency justification and the representation justification on equal footing, yet distinguishes class actions for which efficiency goals are most salient and class actions for which representation goals are most salient. Following this framework, courts can obtain a more expansive understanding of the policy interests behind class actions. This Note has also offered hope that political compromise is possible, arguing that the framework presented here can provide guidance toward crafting reforms related to class actions and arbitration agreements that are respectful of the views of both Republicans and Democrats. The class action war is ultimately not a war between the views of class actions, but a war between their adherents. Those adherents face a choice between continued conflict and compromise.

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that buyers do not detect in contracts, and arguing that, to counteract this effect, provisions that do not increase social welfare should not be enforced). It is also possible that the presence of too many mandatory arbitration agreements is harmful to society. See Albert H. Choi & Kathryn Spier, *The Economics of Class Action Waivers*, 38 *Yale J. on Regul.* 543, 545–46 (2021) (arguing that class action waivers are sometimes not aligned with social welfare).

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## Applicant Education

BA/BS From	Touro College
Date of BA/BS	June 2019
JD/LLB From	New York University School of Law
	<a href="https://www.law.nyu.edu">https://www.law.nyu.edu</a>
Date of JD/LLB	May 19, 2022
Class Rank	School does not rank
Law Review/Journal	Yes
Journal(s)	Journal of Law and Liberty
Moot Court Experience	No

## Bar Admission

## Prior Judicial Experience

Judicial Internships/Externships Yes

Post-graduate Judicial Law Clerk      **No**

### **Specialized Work Experience**

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**This applicant has certified that all data entered in this profile and any application documents are true and correct.**

May 24, 2023

The Honorable Kiyo Matsumoto  
Theodore Roosevelt United States Courthouse  
225 Cadman Plaza East, Room 905 S  
Brooklyn, NY 11201-1818

Dear Judge Matsumoto:

I am a 2022 graduate of New York University School of Law and am interested in a clerkship in your chambers for the 2024 term or any subsequent term. Currently, I am a law clerk at Robbins Geller Rudman & Dowd LLP ("Robbins Geller"), a litigation firm.

In my nine months thus far at Robbins Geller, I have been privileged with opportunities to acquire considerable, diverse experience. Specifically, I contributed to the briefing of two motions for class certification (opening brief in one case and reply and sur-sur-reply in another), a motion to compel discovery (opening brief and reply), a motion for preliminary approval of a class action settlement, a motion to unseal documents, and more. These motions, moreover, spanned three federal districts, exposing me to nuances and variations in the law.

Professor Richard Epstein, one of my recommenders and a close mentor, has kindly offered to serve as a reference. He may be reached at [epsteinr@mercury.law.nyu.edu](mailto:epsteinr@mercury.law.nyu.edu) or 212-992-8858.

My writing sample is a brief on standing. I drafted it originally for a simulation course taught by Judge Harry T. Edwards of the United States Court of Appeals for the District of Columbia, and then recently I revised it to reflect my current skill level.

Something I hope is apparent from my law school transcript is that I am adaptable. Though my grades were unremarkable at first, I did not give up; I experimented relentlessly until I found study strategies that worked for me. This versatility, determination, and desire to grow should, I think, enable me to contribute meaningfully in your chambers.

Respectfully,

Joshua Forgy

**JOSHUA D. FORGY**

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**EDUCATION**

**NEW YORK UNIVERSITY SCHOOL OF LAW, New York, NY**

Juris Doctor, May 2022

Honors: John Bruce Moore Award: *bestowed to one third-year JD student for demonstrated excellence in the area of law and philosophy.*

Dean's Scholarship – *partial tuition scholarship based in part upon academic merit*

Journal of Law and Liberty, *Senior Article Editor*

Activities: Corporations, Tutor (2021)

Contracts, Tutor (2020)

**TOURO COLLEGE, Queens, NY**

Bachelor of Science in Accounting, June 2019

GPA: 3.87

Honors: Lander Scholarship – *partial tuition scholarship based upon academic merit*

Select Coursework: Financial Accounting; Tax; Economics; Finance

**EXPERIENCE**

**ROBBINS GELLER RUDMAN & DOWD LLP, Melville, NY**

*Law Clerk*, September 2022 – present

Helped draft briefs for class certification (an opening brief in one case and a sur-sur-reply in another), preliminary approval of a class action settlement, a motion to unseal documents, a motion to compel discovery (opening brief and reply), and more. Conducted discovery document review on two different cases; helped prepare for multiple depositions and attended one; helped prepare for and attended a mediation.

*Summer Law Clerk*, June – July 2021

Conducted legal research and writing in the field of securities litigation, spanning four federal districts. Analyzed the “truth on the market” defense for materiality; evidence; standard for summary judgment; class action damages; FOIA; and scope, relevance, burden, litigation hold, and sufficiency of interrogatory response in discovery. Drafted two complete briefs, one in support of class certification, and the other for a pro bono asylum seeker.

**PROFESSOR EMMA KAUFMAN, NEW YORK UNIVERSITY SCHOOL OF LAW, New York, NY**

*Research Assistant*, January – May 2021

Conducted factual research regarding the effect of correction officer diversity on prison conditions. Formulated sophisticated Excel applications.

**THE HONORABLE PAUL GARDEPHE, U.S. DISTRICT COURT, S.D.N.Y., New York, NY**

*Judicial Intern*, May – August 2020

Aided the judge in the disposition of about ten motions, including withdrawal of a reference to bankruptcy court, a motion to dismiss for improper venue, a Fair Labor Standards Act damages calculation, an ERISA claim, and a personal injury claim. Drafted a 39-page draft opinion addressing a motion to dismiss in a securities fraud case.

**YESHIVA MADREIGAS HAADOM, Queens, NY**

*Talmudic Research Fellow*, September 2015 – June 2018

Conducted extensive research and wrote theses on complex topics in Talmudic law. Presented and defended theses before peers.

Name: Joshua Forgy  
 Print Date: 06/01/2022  
 Student ID: N13935038  
 Institution ID: 002785  
 Page: 1 of 1

New York University  
 Beginning of School of Law Record

Current	AHRS	EHRS
Cumulative	15.0	15.0
	45.0	45.0

Degrees Awarded

05/18/2022

Spring 2021

Juris Doctor  
 School of Law  
 Major: Law

School of Law  
 Juris Doctor  
 Major: Law

Fall 2019

School of Law Juris Doctor Major: Law				
Lawyering (Year)	LAW-LW 10687	2.5	CR	
Instructor: Shirley Lin				
Criminal Law	LAW-LW 11147	4.0	B	
Instructor: Rachel E Barkow				
Procedure	LAW-LW 11650	5.0	B	
Instructor: Burt Neuborne				
Contracts	LAW-LW 11672	4.0	B+	
Instructor: Clayton P Gillette				
1L Reading Group	LAW-LW 12339	0.0	CR	
Topic: Liberal Anti-Constitutionalism				
Instructor: Christopher Jon Sprigman				

Insurance Law	LAW-LW 11770	3.0	A-
Instructor: Mark A Geistfeld			
Income Taxation	LAW-LW 11994	4.0	A-
Instructor: Laurie L Malman			
Professional Responsibility in the Corporate Context	LAW-LW 12346	2.0	A
Instructor: David B. Harms			
Research Assistant	LAW-LW 12589	2.0	CR
Instructor: Emma M Kaufman			
Cities Seminar	LAW-LW 12771	2.0	A
Instructor: Clayton P Gillette Paul M Romer			

Current	AHRS	EHRS
Cumulative	13.0	13.0
	58.0	58.0

Current	AHRS	EHRS
Cumulative	15.5	15.5

Spring 2020

School of Law  
Juris Doctor  
Major: Law

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Due to the COVID-19 pandemic, all spring 2020 NYU School of Law (LAW-LW.) courses were graded on a mandatory CREDIT/FAIL basis.

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Property	LAW-LW 10427	4.0	CR
Instructor: Katrina M Wyman			
Lawyering (Year)	LAW-LW 10687	2.5	CR
Instructor: Shirley Lin			
Legislation and the Regulatory State	LAW-LW 10925	4.0	CR
Instructor: Emma M Kaufman			
Torts	LAW-LW 11275	4.0	CR
Instructor: Barry E Adler			
1L Reading Group	LAW-LW 12339	0.0	CR
Topic: Liberal Anti-Constitutionalism			
Instructor: Christopher Jon Sprigman			
Financial Concepts for Lawyers	LAW-LW 12722	0.0	CR

Fall 2021

School of Law  
Juris Doctor  
Major: Law

Survey of Securities Regulation	LAW-LW 10322	4.0	A-
Instructor: Stephen J Choi			
Modern Legal Philosophy Seminar: The Books	LAW-LW 11033	2.0	A+
Instructor: Jeremy J Waldron			
Journal of Law and Liberty	LAW-LW 11241	1.0	CR
Constitutional Law	LAW-LW 11702	4.0	A
Instructor: Richard A Epstein			
Federalist Papers Seminar	LAW-LW 11957	2.0	A
Instructor: Stephen Holmes			
Modern Legal Philosophy Seminar: The Books	LAW-LW 12631	1.0	A+
- Writing Credit			
Instructor: Jeremy J Waldron			

Current	AHRS	EHRS
Cumulative	14.0	14.0
	72.0	72.0

Spring 2022

Current	AHRS	EHRS
Cumulative	14.5	14.5
	30.0	30.0

Fall 2020

School of Law  
Juris Doctor  
Major: Law

Corporations	LAW-LW 10644	5.0	B
Instructor: Jennifer Hall Arlen			
Classical Liberalism: History, Theory and Contemporary Jurisprudence Seminar	LAW-LW 11195	2.0	A-
Instructor: Mario Rizzo			
Basic Bankruptcy	LAW-LW 11460	4.0	B
Instructor: Arthur Joseph Gonzalez			
Evidence	LAW-LW 11607	4.0	B
Instructor: Daniel J Capra			

School of Law  
Juris Doctor  
Major: Law

Criminal Procedure: Fourth and Fifth Amendments	LAW-LW 10395	4.0	A-
Instructor: Stephen J Schulhofer			
Directed Research Option A	LAW-LW 10737	2.0	A-
Instructor: Clayton P Gillette			
Federal Courts and The Appellate Process	LAW-LW 10917	4.0	A-
Instructor: Harry T Edwards Elizabeth G Caldwell			
Journal of Law and Liberty	LAW-LW 11241	1.0	CR
Enlightenment Constitutionalism Seminar	LAW-LW 12700	2.0	A
Instructor: Jeremy J Waldron			

Current	AHRS	EHRS
Cumulative	13.0	13.0
	85.0	85.0

Staff Editor - Journal of Law & Liberty 2020-2021  
 Senior Articles Editor - Journal of Law & Liberty 2021-2022

End of School of Law Record



**New York University**  
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School of Law

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**Jeremy Waldron**  
*University Professor*  
*Professor of Law*

May 31, 2022

**RE: Joshua Forgy, NYU Law '22**

Your Honor:

A third-year student of mine at NYU, Mr. Joshua Forgy, is applying for a clerkship in your chambers. He has asked me to write in support of his application. I do so with great enthusiasm.

I know Mr. Forgy as a student in two of my seminars: *Modern Legal Philosophy: The Books* in Fall 2021 and *Enlightenment Constitutionalism* in Spring 2022. Both seminars were demanding, requiring students to grapple analytically with material that was unfamiliar in a variety of ways. In *Modern Legal Philosophy*, students had to read and analyze four leading works in modern jurisprudence (by H.L.A. Hart, Ronald Dworkin, Hans Kelsen, and John Finnis). The class required careful reading of quite densely packed material and the writing of a memo each week on some passage that caught their attention. *Enlightenment Constitutionalism* meant that they had to relate the framing and ratification of the US Constitution to the philosophical ferment in Europe in the 18<sup>th</sup> century, in the work of Montesquieu, Rousseau, Voltaire, Diderot, Condorcet, and many others.

In both classes, Mr. Forgy was a stand-out participant—a steady and thoughtful presence in the class and an intellectual leader among some very bright colleagues. His final paper for *Modern Legal Philosophy* was an exceptionally fine piece of writing. It was on the topic of “A Theory of Theory,” which sounds very abstruse, but was actually a helpful and level-headed attempt to figure out what all these jurisprudes thought they were doing with their “theories” of what law is and how judges do their work. It was a long writing project, requiring the author to respond to a round of detailed comments from me. From the outline all the way through to the final draft, Forgy’s paper matched some quite abstract analysis with very clear writing, sustaining and explicating complex lines of thought. I think it showed exactly the skills he will need as a clerk and as a lawyer. He received the top grade of A+ for the seminar. Also, I have just given an A grade to his paper for *Enlightenment Constitutionalism* on “Rule of Law as a Proxy for Popular Sovereignty.” This too is a very thoughtful and well-written piece of work.

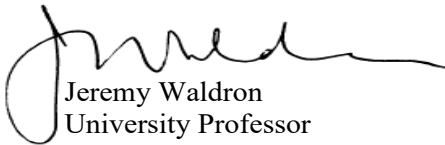
Joshua Forgy, NYU Law '22  
May 31, 2022  
Page 2

In light of all this, Mr. Forgy's receipt of the 2022 John Bruce Moore Award came as no surprise. It is bestowed each year upon one third-year JD student for demonstrated excellence in the area of law and philosophy.

Mr. Forgy has a Yeshiva background, and I am sure this is part of the analytic skill-set that he brings to his law school and that he would bring to your chambers. He knows what an argument is, and how to sustain it; and he leavens his work with a quiet courtesy and a fine-tuned attention to other points of view. He is mature and considerate, and truly a joy to work with.

I believe he will make a very fine clerk. He is passionate about issues of public service and he has the intellectual discipline to match that passion. Joshua Forgy will grace any chambers lucky enough to secure his services. He will do fine work for you. I am happy to convey my strongest recommendation for this candidate.

Sincerely,



Jeremy Waldron  
University Professor  
Professor of Law

April 27, 2023

The Honorable Kiyo Matsumoto  
Theodore Roosevelt United States Courthouse  
225 Cadman Plaza East, Room 905 S  
Brooklyn, NY 11201-1818

Dear Judge Matsumoto:

I am a partner at Robbins Geller Rudman & Dowd LLP in New York. I have known Joshua Forgy since June 2021, when he was a summer associate at my firm. During his two months as a summer associate, I came to know Joshua as we worked together on a pro bono matter. Joshua was tasked with drafting a brief in support of a client's request for asylum. His writing was excellent and he meticulously researched key issues pertaining to our client's case.

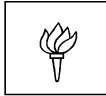
When Joshua returned to Robbins Geller in September 2022 as a full-time associate, I was eager to work with him again. Joshua was assigned to work with me on a securities litigation matter, and jumped right in by drafting a motion to unseal documents filed in a separate but related litigation and a motion for class certification. I was impressed with Joshua's analytical skills, as he turned what would normally be a "throw away" argument in the class certification motion into a much deeper – and persuasive – argument in favor of our clients' position.

Joshua has shown himself to be a mature attorney. He has demonstrated a passion for learning the intricacies of the law and a dedication to thoroughly examining legal and factual questions from all sides. I am confident that Joshua will make an excellent law clerk.

Kind regards,

/s/ Alan I. Ellman, Esq.

Alan Ellman - aellman@rgrdlaw.com



**New York University**  
*A private university in the public service*

*Clayton P. Gillette*  
*Max E. Greenberg Professor of Contract Law*

June 2, 2022

Dear Judge:

I am writing on behalf of Joshua Forgy, a May 2022 graduate of NYU School of Law, who has informed that he has applied for a clerkship with you. Joshua was a student in my Contracts class during his first year of law school and in my Cities Seminar during his second year. He also wrote a directed research paper on sorting and exit as a means of enhancing liberty in federalist systems under my supervision during his third year. It is on the basis of those relationships that I can speak of Joshua's qualifications.

Joshua was a frequent and valued contributor to class discussions in my Contracts class. The quality and context of his comments made his contributions quite valuable. Joshua's training and background in religious study prepared him well for the very different experience of the first-year law school classroom. He demanded consistency in doctrine and raised high-level issues that revealed attention to the nuances and complexities of contract law. More often than not, when I saw that Joshua had raised his hand with a question, I could accurately predict that he was going to juxtapose what I had just said to something I had said earlier in the semester or to some tenet that seemed to be well-embedded in contract doctrine, and to respectfully demand that I explain the apparent inconsistency.

I saw the same rigorous analysis and demand for intellectual integrity in the Cities Seminar, which I taught with Professor Paul Romer. The class was dominated by student discussion of issues ranging from policing, municipal finance, state-local relationships, and race, to local zoning. Joshua was, again, among the most frequent and valuable contributors. What made his contributions most valuable was Joshua's ideological perspective on many of the issues that arose. NYU Law School students tend to be relatively liberal in their outlook, and I have the impression that relatively conservative students are reluctant to express their political perspectives in the classroom. Joshua falls within a small group of relatively libertarian students within the student body. That places him in a distinct minority in any classroom conversation. But he was far from reluctant to share his views. Instead, he expressed them articulately and cogently. I admit that I often pushed back against some of Joshua's views, since I personally see a broader opportunity for government intervention to advance the objectives of cities than Joshua might.

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Joshua never took offense at the pushback; indeed, he welcomed it enough to respond with equal cogency and eloquence. Indeed, we even had some off-Zoom conversations about our respective views. Notwithstanding the occasionally difficult environment among competing perspectives in academia these days, Joshua always expressed his views with civility and deference to the other students in the class despite his different viewpoint. Indeed, I believe that his closest relationship in the class was with the student whose perspective was perhaps most distant from his own.

When Joshua asked me to supervise his directed research paper on federalism, I wanted to decline. Joshua's theory was rooted in his libertarian thinking, and I told him that I feared that I was so opposed to his ideological premises that I was not sure that I could evaluate his contributions fairly. But because I am fond of Joshua and, as an institutional matter, wanted to support student writing, I ultimately agreed. I am glad that I did. Joshua and I had numerous conversations and he developed multiple drafts during which he was as responsive to commentary and criticism as any student author I have encountered. I don't mean that he surrendered his intellectual premises. To the contrary, he doubled down on them. But he did so in a way that focused on the implications of his perspective for legal doctrine rather than on abstract propositions. In the process, Joshua wrote an excellent paper about how federalism and decentralized government could be viewed as an opportunity for sorting among citizens with different preferences, how his libertarian theory was more robust than theories of sorting that rested on efficiency alone, how constraints citizens faced in exiting one jurisdiction for another limited the benefits of sorting, and how current legal doctrines and judicial decisions that are related to sorting were unsatisfactory. He may not have developed a Grand Unified Theory of federalism, but his research and writing demonstrated a command of a wide swath of the relevant literature, and some improvements on it.

All this, I think, bodes well for Joshua's role in chambers. He loves the back-and-forth exchange of ideas. He welcomes rather than shies away from debate. He is not stubborn or locked into a way of thinking when presented with a counterargument. In short, he has an ideology, but he is not an ideologue. He writes well and easily, in a less formal and stodgy manner than most student writers. Beyond all that, Joshua is a genuinely nice person. He is a bit older than the average student, and more than a bit more mature. My multiple experiences with him are all favorable and I am not aware of any negative characteristics that would offset what I have written above.

Please let me know if you have any questions that I might address.

Sincerely,  
Clayton P. Gillette

April 27, 2023

The Honorable Kiyo Matsumoto  
Theodore Roosevelt United States Courthouse  
225 Cadman Plaza East, Room 905 S  
Brooklyn, NY 11201-1818

Dear Judge Matsumoto:

Mr. Joshua Forgy has asked me to write a letter of recommendation in support of his application for the position as your clerk for 2023-2024. I had Mr. Forgy as a student in my constitutional law class, in which it was clear that he was very strong indeed. During the class, and often in discussions afterward, he showed a solid philosophical bent so that the A+ grades that he got in his courses in this area were by no means flukes. His comments were always on the mark, both thoughtful and authoritative. I was generally amazed at how well he did in class. When he received a strong A on his final examination, I was sufficiently impressed that I offered him a job as a research assistant, only to discover that he was going to graduate in June 2022, as he, of course, did.

One of the things that is striking about Mr. Forgy is that he had to learn how to work within the system of legal education. His first semester grades were ordinary, but once he caught on to the method, he sparkled and shined, as was the case in his class with me. At the one level, he is a good technical lawyer, as is evidenced by his employment in securities litigation, which in part reflects his strong undergraduate performance as an accounting major. The last time we spoke, he mentioned that he was going back to Robbins Geller after graduation to continue working on securities litigation.

What is most striking about him to me, however, is that side by side with these strong conventional skills, he has an excellent and curious mind, so that, unlike most students, he was always looking for some larger set of generalizations that went beyond the particulars of any given case.

That frame of mind is evident from his extensive efforts to refine various principles of natural law to show that they form a coherent structure. His work is often at odds with my own, as in the essay that he wrote on Federalism as an Instrument to Facilitate Consumer Choice. In that essay, Forgy takes the general view that it is best to stick with the Lockean concept of property as a gift from God to mankind in common, as opposed to the Roman (and common law) view that certain properties—rivers, the air, the beach—are held in common (as *res communes*), but that other forms of property—land, chattels, and animals—are unowned (as *res nullius*) in the state of nature, and thus are only reduced to possession by the occupation of land, the capture of animals, and seizure of chattels, which are unowned in the original state of nature.

He is also interested in the way in which notions of Federalism interact with notions of individual autonomy in ways that argue for the dominance of local government, even over the states of which they are part. In so doing, he makes effective use of the standard Tiebout model, which shows how local governments compete with each other on various characteristics to allow for efficient sorting by the state of its various citizens. Constitutionally, the law is quite the opposite, as it is widely held that counties and municipal governments are creatures of the state that forms them (as in the reapportionment cases), so that they have no ability to resist regulation or elimination from the state. But the point in this and in all the other papers that he writes is that his mind is always churning; his command of the basic literature is strong; his imagination is in constant motion. He will do well as an academic if he were so inclined and should have a distinguished career in the practice of law if he moves in that direction.

In sum, Mr. Forgy is not your standard-issue student or law clerk. Thus, his virtues are many, his intelligence robust, and his appetite for strong and continuous work quite dramatic. He is an original and worthy of your most serious consideration. My only regret with Mr. Forgy is that in a zoom-age I was not able to get to know him better.

Best regards,

Richard A. Epstein

Richard Epstein - richard.epstein@nyu.edu - (212) 992-8858

ORAL ARGUMENT SCHEDULED FOR APRIL 5, 2022

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No. 21-5028

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IN THE UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT

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WASHINGTON ALLIANCE OF TECHNOLOGY WORKERS,

*Appellant,*

*against*

U.S. DEPARTMENT OF HOMELAND SECURITY, ET AL.,

*Appellees.*

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On Appeal from an Order Entered in the  
United States District Court for the District of Columbia  
No. 1:16-cv-01170-RBW

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**APPELLANT'S OPENING BRIEF**

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JOSHUA FORGY  
*Counsel for Appellant*  
joshua.forgy@law.nyu.edu

Date: March 21, 2022

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### ISSUE PRESENTED FOR REVIEW

Whether a labor union, the members of which have struggled for years to find work in an already-competitive labor market, has Article-III standing to challenge agency regulations that cause an influx in the supply of labor in its members' field.

### STATEMENT OF THE CASE

*[I have removed most of this section because it was written jointly with a partner. The following is a synopsis containing only the facts relevant for standing. JDF.]*

An F-1 visa allows an alien “who is a bona fide student” to enter the United States “temporarily and solely for the purpose of” studying at an established academic institution. 8 U.S.C. § 1101(a)(15)(F)(i).

The Immigration and Naturalization Service (“INS”) promulgated an interim rule in 1992 creating the optional practical training (“OPT”) program, which allowed F-1 student visa holders to work in the United States for up to a year after completing their academic studies.

In 2008, the Department of Homeland Security (“DHS”; successor to INS) promulgated a rule allowing for students in science, technology, engineering or mathematics (“STEM”) fields to receive an additional seventeen-month OPT extension, for a total of twenty-nine months of practical training. This extension was eventually challenged and ultimately vacated because it had been promulgated without notice and comment.

In 2015, DHS issued a notice of proposed rulemaking and request for public comments. In place of the 2008 rule’s seventeen-month STEM extension, the new proposal would create a twenty-four-month STEM extension, for a total of thirty-six months of practical training.

Otherwise, the proposed new rule was substantially identical to the 2008 rule. The new STEM extension went into effect in March 2016.

Washington Alliance of Technology Workers (“Washtech”), a labor union of STEM employees, brought this action in June 2016 alleging that the entire OPT Program exceeds DHS authority and must be set aside under Section 706 of the Administrative Procedures Act. The district court held that Washtech lacked standing to challenge the 1992 rule, because it believed that Washtech members competed only with beneficiaries of the OPT STEM *extension* and not with beneficiaries of the original 1992 OPT Program. And it dismissed Washtech’s challenge to the STEM extension for failure to state a claim.

Washtech appealed. The circuit court declined to affirm the district court’s conclusion that Washtech lacked standing to challenge the 1992 rule, reasoning that “allegations regarding the 2016 Rule naturally and inevitably encompass allegations against the 1992 Rule” because one cannot apply for a STEM extension “without first working for twelve months as authorized by the 1992 Rule.” The circuit court also reversed the district court’s 12(b)(6) dismissal, concluding that Washtech had plausibly alleged that DHS had overstepped its statutory authority.

Both parties moved for summary judgment. The district court found that Washtech still had standing, even under the heightened burden of proof required at the summary judgment stage. On the merits, however, the district court once again ruled in favor of the Government, finding that the OPT Program was within DHS’s statutory authority. Washtech now appeals. [*Although Washtech lost only on the merits and it does not appear that the Government cross-appealed the issue of standing, I was assigned to brief standing since the court of appeals might of its own initiative request briefing on this jurisdictional matter. JDF.*]

### SUMMARY OF ARGUMENT

The doctrine of competitor standing recognizes that the OPT Program causes actual injury to Washtech members by allowing increased competition in their field. Such injury is not limited to the extreme situation where a competitor actually diverts business from the challenger or fills a job opening that might otherwise have gone to the challenger. The mere existence of increased competition injures market participants by forcing them to invest more time and resources to maintain their competitive edge.

In the context of a labor market, an influx in the supply of workers injures not only those who are actively applying for jobs. Even those who merely monitor the market, waiting to apply should an opportunity arise, suffer the same injury. In fact, market saturation causes even those who are comfortably employed to feel economic pressures, such as exposure to potential wage and hour cuts.

Here, the OPT Program has caused and continues to cause increased competition in the STEM field. And Washtech members not only work in that field, but also actively monitored the market when this suit was filed. Washtech therefore has standing to challenge the OPT Program.

### ARGUMENT

#### Standard of Review

Standing is reviewed de novo. *Am. Inst. of Certified Pub. Accts. v. I.R.S.*, 804 F.3d 1193, 1196 (D.C. Cir. 2015) (citing *Mendoza v. Perez*, 754 F.3d 1002, 1010 (D.C. Cir. 2014)).

### **A. WASHTECH HAS STANDING TO CHALLENGE THE OPT PROGRAM, BECAUSE THE PROGRAM INJURES WASHTECH MEMBERS**

“The competitor standing doctrine recognizes parties suffer constitutional injury in fact when agencies lift regulatory restrictions on their competitors or otherwise allow increased competition.” *Mendoza*, 754 F.3d at 1011 (internal citation and quotation marks omitted); *accord Sherley v. Sebelius*, 610 F.3d 69, 73 (D.C. Cir. 2010). Intensified competition makes market participants “need to adjust their . . . strateg[ies,]” *Shays v. Fed. Election Comm’n*, 414 F.3d 76, 87 (D.C. Cir. 2005), for instance by “invest[ing] more time and resources” to maintain their competitive edge, *Sherley*, 610 F.3d at 74. “That is an actual, here-and-now injury.” *Id.*

“Because increased competition almost surely injures a [market participant] in one form or another, he need not wait until allegedly illegal transactions hurt him competitively before challenging the regulatory . . . decision that increases competition.” *Id.* at 72. “Thus, an individual in the labor market for [STEM] jobs would have standing to challenge [DHS] rules that lead to an increased supply of labor—and thus competition—in that market.” *Mendoza*, 754 F.3d at 1011.

More specifically, competitor standing is satisfied wherever (1) agency action “illegally structure[s] a competitive environment” in which (2) a party “defend[s] concrete interests[.]” *Cf. Shays*, 414 F.3d at 87. Here, the OPT Program illegally structures the STEM environment by causing an influx of labor. And Washtech members defend concrete interests in that market: they monitored the market for openings when this suit was filed, and they are to this day active participants in the market. Washtech therefore has standing to challenge the OPT Program.

#### **1. The OPT Program Causes Increased Competition in the STEM Field**

It is undisputed that the original 1992 OPT Program and the 2008 STEM extension—which was in effect for about seven years until being vacated in 2015—enabled tens of thousands of F-1 student visa holders to work in the U.S. *See, e.g., Washtech III Appeal*, 892 F.3d at 340 (observing

that “Washtech’s allegations of increased competition in the STEM labor market are supported by facts found outside of the complaint . . . .”); Letter from John G. Falle, Assoc. Vice President, Univ. of California, to Katherine Westerlund, Acting Pol’y Chief, Student and Exch. Visitor Program, I.C.E. (November 17, 2015) at 1, J.A. 113 (“UC . . . currently sponsors more than 1,500 individuals utilizing STEM OPT . . . .”).<sup>1</sup>

Thus, the first element of competitor standing doctrine—illegal structuring of a competitive environment—is plainly met.

## 2. Washtech Members Defend Concrete Interests in the STEM Field

The second element, defense of concrete interests in the affected environment, is satisfied in the following two independent ways.

### (i) Washtech Members are Employed in STEM to this Day

An increase in the supply of labor injures everyone in the industry, even those comfortably employed, “by exposing them to potential job loss, wage and hour cuts, and other competitive pressures.” *Air Line Pilots Ass’n, Int’l v. Chao*, 889 F.3d 785, 789 (D.C. Cir. 2018). As this Court has recognized, “[t]he supply side of a labor market is made up of those individuals who are employed *and* those actively looking for work.” *Save Jobs USA v. Dep’t of Homeland Sec.*, 942 F.3d 504, 511 (D.C. Cir. 2019) (emphasis in original).

Here, it is undisputed that Washtech members work in the STEM market. One is “employed currently as a computer programmer[.]” Blatt Decl. at 2, J.A. 173. Another is

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<sup>1</sup> Although comparable statistics on the impact of the 2016 STEM extension are not yet available, they are also not necessary. *Cf. Save Jobs*, 942 F.3d at 510 (“Although Save Jobs has offered no evidence that the competitive harm it claims from the rule has yet occurred—indeed, the members lost their jobs, and Save Jobs filed suit, before the rule went into effect—our precedent imposes no such requirement.”) (internal citations and quotation marks omitted). “[W]e know that [F-1] visa holders have competed with [Washtech’s] members in the past, and, as far as we know, nothing prevents them from doing so in the future.” *Id.* at 511.

“employed currently as a temporary computer systems and networking administrator.” Smith Decl. at 1, J.A. 179. A third is a “Software Design Engineer.” Sawade Decl. at 2, J.A. 185. Nothing further is needed to establish their injury in fact.

(ii) *Washtech Members Actively Monitored the Market for Positions When this Suit Was Filed*

Not only are Washtech members currently employed in the STEM market, but they also formerly “monitored the labor market for acceptable positions.” *Mendoza*, 754 F.3d at 1013. Specifically, at least two Washtech members were monitoring the market in June 2016, when this suit was filed. *Cf. Equal Rts. Ctr. v. Post Properties, Inc.*, 633 F.3d 1136, 1141 (D.C. Cir. 2011) (noting that what matters for standing purposes, even at the summary judgment stage, is injury “at the time the plaintiff files suit”).

The first is Caesar Smith. In July 2016, he “interviewed for [a] position with AT&T[.]” Smith Decl. at 4, J.A. 182. Prior to his July interview he must have applied, and prior to applying he must have been monitoring the market. It is therefore virtually certain that Smith was involved in his job search for some time before this suit was filed on June 17, 2016.<sup>2</sup>

The second is Douglas Blatt. From January through March of 2016, Blatt applied for dozens of jobs. *See Blatt Decl.* at 4-6, J.A. 175-77. At some point in 2016 (the record does not say exactly when), he obtained a “contract position with Alert Logic . . . .” *Id.* at 3, J.A. 174. Contract positions are notoriously “unreliable sources of income” and are subject to “end . . . without notice.” Sawade Decl. at 2-3, J.A. 185-86. Indeed, Blatt *did* lose this job just a few months later.

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<sup>2</sup> To be sure, on summary judgment this Court “need not accept appellants’ alleged chain of events if they are unable to demonstrate competent evidence to support each link.” *Fla. Audubon Soc. v. Bentsen*, 94 F.3d 658, 672 (D.C. Cir. 1996). But that does not mean reasonable inferences are impermissible. To the contrary, “competent evidence” implies that inferences *are* permissible as long as they are grounded in “specific facts” as opposed to “mere allegations[.]” *Cf. id.* at 666. Where, as here, the evidence adduced makes the inference of injury exceedingly probable, standing is established even for purposes of summary judgment.

Blatt Decl. at 3, J.A. 174. As someone who had been active in this field for years, *see generally id.*, Blatt surely recognized the precariousness of his position. It is therefore reasonable to presume that Blatt was monitoring the market for a full-time position throughout 2016—including June, when this suit was filed.

To summarize, the evidence shows both that the OPT Program has caused increased competition in the STEM market, and that Washtech members are actively engaged in that market. Washtech therefore has competitor standing to challenge the OPT Program.

### **3. The Economic Pressures Faced by Washtech Members are “Direct and Current”**

The Government may assert that, to have standing, Washtech must show that its members have competed with F-1 visa holders for the *exact same positions*. However, while there is some caselaw suggesting that plaintiffs in competitor-standing cases must show “direct and current” competition, *e.g.*, *KERM, Inc. v. F.C.C.*, 353 F.3d 57, 60 (D.C. Cir. 2004), that does not mean competition for the very same job. This Court has recently cautioned against “overread[ing]” the “‘direct and current competitor’ formulation, which simply distinguishes an existing market participant from a potential—and unduly speculative—participant.” *Save Jobs*, 942 F.3d at 510. An example of such “unduly speculative” market participation would be where one of the parties has yet to even obtain the requisite licenses or regulatory approval to expand into the other’s market. *Id.*; *see also Sherley*, 610 F.3d at 73-74.<sup>3</sup>

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<sup>3</sup> Although two recent decisions of this Court did take note of the fact that the plaintiffs and their competitors were competing for the same jobs, *see Save Jobs*, 942 F.3d at 510; *Washtech III Appeal*, 892 F.3d at 339-40, neither of those cases contains language suggesting that such direct competition is a *necessary* condition to establish injury. This Court focused on those details because they happened to be the details presented. Direct competition is one way to show injury; it may be sufficient, but it is not necessary.

*Shays* is instructive. A pair of Congressmen challenged Federal Election Commission (“FEC”) rules that they believed made them “‘open to attack’ by [illegal] advertising” and caused them to “face the ‘strong risk’ that opponents will use improper soft money spending against them . . . .” *Shays*, 414 F.3d at 85. The FEC argued that “the two Congressmen [could] not show injury” because their “affidavits demonstrate[d] no specific use of the rules by their political opponents . . . .” *Id.* at 84. This Court, however, affirmed the district court’s summary judgment in favor of the Congressmen, finding the fact that “rival candidates *may* have supporters finance issue ads” and “*may* spend soft money to pay employees” sufficient to constitute injury in fact. *Id.* at 86 (emphasis added).

*Sherley* is likewise illuminating. Researchers who relied upon federal research grant monies challenged National Institutes of Health (“NIH”) guidelines that would broaden the pool of eligible recipients for those grants. *Sherley*, 610 F.3d at 71. NIH responded that it was “entirely conjectural” the plaintiffs and the newcomers would ever compete for the same funds, in part because grant proposals submitted to NIH are sorted to “one or more of the 24 Institutes and Centers (ICs) at the NIH.” *Id.* at 73. “In other words, . . . there [wa]s no certainty that an application” from the newcomers would “arrive at an IC in the same funding cycle as an application from” the plaintiffs. *Id.* Nevertheless, this Court held the plaintiffs had standing to challenge the NIH action. *Id.* at 74.<sup>4</sup>

Accordingly, even if “there is no certainty” that a Washtech member and an OPT Program participant will simultaneously apply for the same job, *id.* at 73, Washtech nonetheless has standing to challenge the Program.

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<sup>4</sup> Although *Sherley* was decided on a motion to dismiss, it is still instructive of *what* the test for standing is, even if the burden to *meet* that test is higher at summary judgment.

**B. WASHTECH’S INJURY IS TRACEABLE TO THE OPT PROGRAM AND REDRESSABLE BY A FAVORABLE DECISION OF THIS COURT**

“[T]he causation requirement for constitutional standing is met when a plaintiff demonstrates that the challenged agency action authorizes the conduct that allegedly caused the plaintiff’s injuries,” and “the redressability requirement may be satisfied by vacating the challenged rule.” *Shays*, 414 F.3d at 92–93, 95 (internal citations omitted).

In the competitor-standing context, these two elements virtually never present an obstacle. *See, e.g., Int’l Bhd. of Teamsters v. U.S. Dep’t of Transp.*, 724 F.3d 206, 212 (D.C. Cir. 2013) (finding these two requirements “easily” met “because, absent the [challenged] program, [plaintiffs] would not be subject to increased competition . . . .”); *Sherley*, 610 F.3d at 72 (“[W]e address only the question whether [plaintiffs] allege a legally adequate injury-in-fact . . . . for it is clear the alleged injury is traceable to the Guidelines and redressable by the court.”).

Here, as this Court already concluded at the motion-to-dismiss stage, “Washtech’s injury is caused by the 2016 Rule. The increase in competition is directly traceable to the DHS because the DHS’s regulations authorize work for the OPT participants with whom Washtech members compete for jobs.” *Washtech III Appeal*, 892 F.3d at 341. Redressability is likewise satisfied, because a “court order invalidating the 2016 Rule would eliminate workers from the STEM job market and therefore decrease competition for the STEM jobs pursued by Washtech’s members.” *Id.* The evidence that has been amassed since the motion to dismiss only strengthens these conclusions.

Accordingly, because injury in fact, traceability, and redressability are all met, Washtech has standing to challenge the OPT Program.

**Applicant Details**

First Name **Connor**  
 Middle Initial **J**  
 Last Name **Fraser**  
 Citizenship Status **U. S. Citizen**  
 Email Address [cjf8311@nyu.edu](mailto:cjf8311@nyu.edu)

Address

Address
Street
<b>124 W 25th Street #1R</b>
City
<b>New York</b>
State/Territory
<b>New York</b>
Zip
<b>10001</b>
Country
<b>United States</b>

Contact Phone Number **9788574443**  
 Other Phone Number **9784740122**

**Applicant Education**

BA/BS From **Columbia University**  
 Date of BA/BS **May 2017**  
 JD/LLB From **New York University School of Law**  
<https://www.law.nyu.edu>  
 Date of JD/LLB **May 17, 2023**  
 Class Rank **School does not rank**  
 Law Review/Journal **Yes**  
 Journal(s) **NYU Law Review**  
 Moot Court Experience **Yes**  
 Moot Court Name(s) **Orison S. Marden Moot Court Competition**

**Bar Admission****Prior Judicial Experience**

Judicial Internships/ Externships	No
Post-graduate Judicial Law Clerk	No

### **Specialized Work Experience**

#### **Recommenders**

Wyman, Katrina  
katrina.wyman@nyu.edu  
212-998-6033

Meltzer, Hilary  
hmeltzer@law.nyc.gov  
212-356-2070

Davis Noll, Bethany  
bethany.davisnoll@nyu.edu  
(212) 998-6239

**This applicant has certified that all data entered in this profile and any application documents are true and correct.**

Connor J. Fraser  
124 W 25th Street #1R  
New York, NY 10001

June 12, 2023

The Honorable Kiyo Matsumoto  
United States District Court  
Eastern District of New York  
Theodore Roosevelt United States Courthouse  
225 Cadman Plaza East, Room 905 S  
Brooklyn, NY 11201-1818

Dear Judge Matsumoto:

I write to apply for a clerkship in your chambers for the 2025-2026 term or any subsequent term. I recently graduated from New York University School of Law, where I was an Executive Editor on the *Law Review* and a member of the boards of the Environmental Law Society and the Public Interest Law Student Association. This summer, I will join the Federal Energy Regulatory Commission as a clerk in the Office of Administrative Law Judges.

Please find enclosed my resume, law school transcript, writing sample, and letters of recommendation. My writing sample is an excerpt of the opinion that I submitted for my spring seminar, Supreme Court Simulation. My recommenders are Professor Katrina M. Wyman (katrina.wyman@nyu.edu; (212) 998-6033), Professor Bethany Davis Noll (bethany.davisnoll@nyu.edu; (212) 998-6239), and Professor Hilary Meltzer (hmeltzer@law.nyc.gov; (212) 356-2070). I was a research assistant for Professor Wyman, took two of her classes, and worked extensively with her throughout my fellowship at the Guarini Center on Environmental, Energy, and Land Use Law. Professor Davis Noll taught my Government Lawyering at the State Level seminar and also worked closely with me during my fellowship. Professor Meltzer supervised me during my internship and externship with the Environmental Law Division of the New York City Law Department and taught my clinic seminar. Professor Avani Mehta Sood (avani.sood@nyu.edu; (212) 998-6213) is also happy to serve as a reference for me. I was a research assistant for Professor Sood and participated in her seminar this spring.

I would welcome the opportunity to interview with you, and I can be reached at (978) 857-4443 or [cjf8311@nyu.edu](mailto:cjf8311@nyu.edu). Thank you for considering my application.

Respectfully,



Connor J. Fraser

## CONNOR J. FRASER

124 W 25th Street #1R, New York, NY 10001  
(978) 857-4443 | cjf8311@nyu.edu

### EDUCATION

#### NEW YORK UNIVERSITY SCHOOL OF LAW, New York, NY

J.D., May 2023

Honors: *New York University Law Review*, Executive Editor  
Paul & Marie Napoli Student Fellowship in Environmental Law & Policy  
Maurice Goodman Memorial Prize—*outstanding academic achievement & scholarship*

Activities: Environmental Law Society, Career and Speakers Chair  
Public Interest Law Student Association, 2L Working Group Member  
Professor Maggie Blackhawk, Teaching Assistant (Constitutional Law)  
Professor David Simson, Teaching Assistant (Lawyering)  
OUTLaw LGBT Student Association, Member

Publications: *The Public Plastic Nuisance: Life in Plastic, Not So Fantastic*, 98 N.Y.U. L. REV. (forthcoming 2023)  
*Recycled Misrepresentation: Plastic Products, Consumer Protection Law & Attorneys General*, 31 N.Y.U. ENV'T L.J. (forthcoming 2023)

#### COLUMBIA UNIVERSITY, COLUMBIA COLLEGE, New York, NY

B.A. in Economics and Sociology, with concentration in Business Management, *cum laude*, May 2017

Honors: Edward T. Kennedy Memorial Prize—*recognizing the top scholar-athlete for men's swimming*

Activities: NCAA Division I Varsity Swimming, Athlete and Captain (2016-2017)  
*Columbia Daily Spectator*, Associate Design Editor

### EXPERIENCE

#### FEDERAL ENERGY REGULATORY COMMISSION, OFFICE OF ADMINISTRATIVE LAW JUDGES, Washington, DC *Law Clerk / Attorney Advisor*, August 2023 – August 2025

#### NYU-YALE AMERICAN INDIAN SOVEREIGNTY PROJECT, NYU SCHOOL OF LAW, New York, NY

*Student Participant, Native Amicus Briefing Project*, Spring 2023

Wrote memoranda that analyzed the definition of “Indian” under the Major Crimes Act and proposed amicus arguments for prospective appellate cases. Researched and summarized legislative history related to the plenary power doctrine.

#### GUARINI CENTER ON ENVIRONMENTAL, ENERGY & LAND USE LAW, NYU SCHOOL OF LAW, New York, NY

*Paul & Marie Napoli Student Fellow in Environmental Law & Policy*, January 2022 – January 2023

Presented original research to lawyers for state attorneys general. Wrote articles on topics related to plastics litigation, including one report that 16 states submitted with their joint public comments to the FTC. Contributed analysis and research to the Plastics Litigation Tracker, a database hosted by the Guarini Center and NYU's State Energy & Environmental Impact Center. Participated in a panel discussion for an international summit hosted by ClientEarth.

#### INSTITUTE FOR POLICY INTEGRITY, NYU SCHOOL OF LAW, New York, NY

*Legal Extern, Regulatory Policy Clinic*, September 2022 – December 2022

Researched and drafted issue brief on the environmental justice implications of carbon capture & sequestration projects. Authored memorandum on the application of Title VI to federal tax incentives in the Inflation Reduction Act.

#### U.S. DEPARTMENT OF JUSTICE, ENVIRONMENT AND NATURAL RESOURCES DIVISION, Washington, DC

*Summer Law Clerk, Environmental Enforcement Section*, Summer 2022

Prepared complaint for case involving violations of the Clean Air Act's ozone nonattainment plan requirements. Drafted brief supporting summary judgment on claims related to injuries to national park resources. Researched and authored memorandum analyzing the right to a jury trial for natural resource damages. Observed hearings related to discovery issues and settlement negotiations.

**PROFESSOR AVANI MEHTA SOOD, NYU SCHOOL OF LAW, New York, NY**

***Research Assistant***, Summer 2022

Coded and analyzed qualitative data from a nationwide survey of stakeholder views on verdict format in criminal jury trials. Researched the development of criminal jury instruction committees. Created graphs and tables to represent quantitative survey data. Provided feedback on forthcoming article.

**NEW YORK CITY LAW DEPARTMENT, ENVIRONMENTAL LAW DIVISION, New York, NY**

***Legal Extern, Representing New York City Clinic***, January 2022 – April 2022

***Summer Honors Intern***, Summer 2021

Researched and authored memoranda analyzing environmental review exemptions, eminent domain, and deliberative process privilege for City agencies. Drafted sections of briefs defending the land use approval processes for major rezonings. Prepared affidavits from City officials and multiple settlement memoranda for City violations of state environmental regulations.

**PROFESSOR KATRINA M. WYMAN, NYU SCHOOL OF LAW, New York, NY**

***Research Assistant***, May 2021 – January 2022

Wrote several memoranda analyzing how cities might impose taxes or fees on meat products. Researched the treatment of environmental labels under the First Amendment, NAFTA expropriation claims related to renewable energy projects, and cities' impact fee structures. Edited and verified citations in forthcoming articles and book chapters.

**BARCLAYS CAPITAL INC., New York, NY**

***Assistant Vice President / Analyst, Municipal Syndicate***, May 2019 – July 2020

***Analyst, Public Power & Utilities Banking***, July 2017 – May 2019

Executed competitive bids for municipal bonds. Conducted debt modeling for live transactions and proposals. Managed due diligence procedures. Counseled a large public utility as a FINRA-certified Municipal Advisor Representative.

**ADDITIONAL INFORMATION**

Volunteered as a math tutor to high school students at the Columbia Tutoring & Learning Center and as a swim instructor for Columbia's Swim School. Enjoy ice hockey, classical poetry, and distance running.

Name: Connor J Fraser  
 Print Date: 06/05/2023  
 Student ID: N10681095  
 Institution ID: 002785  
 Page: 1 of 2

New York University  
 Beginning of School of Law Record

Summer 2021 Research Assistant  
 Instructor: Katrina M Wyman

Degrees Awarded				Current	AHRS	EHRS
Juris Doctor School of Law Major: Law				05/17/2023	15.0	15.0
				Cumulative	45.0	45.0
				Spring 2022		
Fall 2020				School of Law Juris Doctor Major: Law		
School of Law Juris Doctor Major: Law				Government Lawyering at the State Level Seminar	LAW-LW 11303	2.0 A
Lawyering (Year)				Instructor: Bethany Davis Noll		
Instructor: Christopher B Jaeger				Evidence	LAW-LW 11607	4.0 B
Criminal Law				Instructor: Daniel J Capra		
Instructor: Erin Murphy				Teaching Assistant	LAW-LW 11608	2.0 CR
Torts				Instructor: David Simson		
Instructor: Barry E Adler				NYC Law Department Externship Seminar	LAW-LW 12464	2.0 A
Procedure				Instructor: Christine Mae Billy Hilary Meltzer		
CR/F grade option allowed due to extenuating circumstances: original professor's health issue required a series of alternating class sessions by professor and two other professors.				NYC Law Department Externship	LAW-LW 12501	3.0 CR
Instructor: Arthur R Miller				Instructor: Christine Mae Billy Hilary Meltzer		
1L Reading Group					AHRS	EHRS
Topic: The Supreme Court				Current	13.0	13.0
Instructor: Trevor W Morrison Alison J Nathan				Cumulative	58.0	58.0
				Fall 2022		
Current				School of Law Juris Doctor Major: Law		
Cumulative					AHRS	EHRS
				Regulatory Policy Clinic Seminar	LAW-LW 10105	2.0 A
Spring 2021				Instructor: Richard L Revesz Jack Henry Lienke		
School of Law Juris Doctor Major: Law				Regulatory Policy Clinic	LAW-LW 11029	3.0 A
Property				Instructor: Richard L Revesz Jack Henry Lienke		
Instructor: Katrina M Wyman				Law Review	LAW-LW 11187	1.0 CR
Lawyering (Year)				Professional Responsibility and the Regulation of Lawyers	LAW-LW 11479	2.0 A-
Instructor: Christopher B Jaeger				Instructor: Barbara Gillers		
Legislation and the Regulatory State				Orison S. Marden Moot Court Competition	LAW-LW 11554	1.0 CR
Instructor: Samuel J Rascoff				Federal Courts and the Federal System	LAW-LW 11722	4.0 B+
Contracts				Instructor: Roderick M Hills		
Instructor: Liam B Murphy				Research Assistant	LAW-LW 12589	1.0 CR
1L Reading Group				Summer 2022 Research Assistant		
Instructor: Trevor W Morrison Alison J Nathan				Instructor: Avani Mehta Sood		
Financial Concepts for Lawyers					AHRS	EHRS
				Current	14.0	14.0
				Cumulative	72.0	72.0
				Spring 2023		
Fall 2021				School of Law Juris Doctor Major: Law		
School of Law Juris Doctor Major: Law				Natural Resources Law and Policy	LAW-LW 10028	2.0 A
International Environmental Law Seminar				Instructor: Katrina M Wyman Natalie L Jacewicz		
Instructor: Richard Bryce Rudyk Richard B Stewart				Environmental Justice	LAW-LW 10424	2.0 A
Environmental Law				Instructor: Sara E. Imperiale Yukyan Lam		
Instructor: Richard L Revesz				Supreme Court Simulation Seminar	LAW-LW 11112	3.0 A
Constitutional Law				Instructor: Troy A McKenzie Jack L Millman		
Instructor: Adam M Samaha				Law Review	LAW-LW 11187	1.0 CR
Energy Law Regulation and Policy						
Instructor: Michael Jay Gergen						
Research Assistant						

**Name:** Connor J Fraser  
**Print Date:** 06/05/2023  
**Student ID:** N10681095  
**Institution ID:** 002785  
**Page:** 2 of 2

Psychological Dimensions of Criminal Law	LAW-LW 11376	2.0	A+
Instructor: Avani Mehta Sood			
Teaching Assistant	LAW-LW 11608	2.0	CR
Instructor: Maggie Blackhawk			
Directed Research Option B	LAW-LW 12638	1.0	A
Instructor: Maggie Blackhawk			
	<u>AHRS</u>	<u>EHRS</u>	
Current	13.0	13.0	
Cumulative	85.0	85.0	
Staff Editor - Law Review 2021-2022			
Executive Editor - Law Review 2022-2023			
<b>End of School of Law Record</b>			

Unofficial

**TRANSCRIPT ADDENDUM FOR NYU SCHOOL OF LAW  
JD & LLM STUDENTS**

*I certify that this is a true and accurate representation of my NYU School of Law transcript.*

**Grading Guidelines**

Grading guidelines for JD and LLM students were adopted by the faculty effective fall 2008. These guidelines represented the faculty's collective judgment that ordinarily the distribution of grades in any course will be within the limits suggested. An A + grade was also added.

Effective Fall 2020, the first-year J.D. grading curve has been amended to remove the previous requirement of a mandatory percentage of B minus grades. B minus grades are now permitted in the J.D. first year at 0-8% but are no longer required. This change in the grading curve was proposed by the SBA and then endorsed by the Executive Committee and adopted by the faculty. Grades for JD and LLM students in upper-level courses continue to be governed by a discretionary curve in which B minus grades are permitted at 4-11% (target 7-8%).

<b>First-Year JD (Mandatory)</b>	<b>All other JD and LLM (Non-Mandatory)</b>
A+: 0-2% (target = 1%) (see note 1 below)	A+: 0-2% (target = 1%) (see note 1 below)
A: 7-13% (target = 10%)	A: 7-13% (target = 10%)
A-: 16-24% (target = 20%)	A-: 16-24% (target = 20%)
<b>Maximum for A tier = 31%</b>	<b>Maximum for A tier = 31%</b>
B+: 22-30% (target = 26%)	B+: 22-30% (target = 26%)
<b>Maximum grades above B = 57%</b>	<b>Maximum grades above B = 57%</b>
B: remainder	B: remainder
B-: 0-8%*	B-: 4-11% (target = 7-8%)
C/D/F: 0-5%	C/D/F: 0-5%

The guidelines for first-year JD courses are mandatory and binding on faculty members; again noting that a mandatory percentage of B minus grades are no longer required. In addition, the guidelines with respect to the A+ grade are mandatory in all courses. In all other cases, the guidelines are only advisory.

With the exception of the A+ rules, the guidelines do not apply at all to seminar courses, defined for this purpose to mean any course in which there are fewer than 28 students.

In classes in which credit/fail grades are permitted, these percentages should be calculated only using students taking the course for a letter grade. If there are fewer than 28 students taking the course for a letter grade, the guidelines do not apply.

**Important Notes**

1. The cap on the A+ grade is mandatory for all courses. However, at least one A+ can be awarded in any course. These rules apply even in courses, such as seminars, where fewer than 28 students are enrolled.
2. The percentages above are based on the number of individual grades given – not a raw percentage of the total number of students in the class.
3. Normal statistical rounding rules apply for all purposes, so that percentages will be rounded up if they are above .5, and down if they are .5 or below. This means that, for example, in a typical first-year class of 89 students, 2 A+ grades could be awarded.
4. As of fall 2020, there is no mandatory percentage of B minus grades for first-year classes.

**Updated: 10/4/2021**

NYU School of Law does not rank students and does not maintain records of cumulative averages for its students. For the specific purpose of awarding scholastic honors, however, unofficial cumulative averages are calculated by the Office of Records and Registration. The Office is specifically precluded by faculty rule from publishing averages and no record will appear upon any transcript issued. The Office of Records and Registration may not verify the results of a student's endeavor to define his or her own cumulative average or class rank to prospective employers.

Scholastic honors for JD candidates are as follows:

<i>Pomeroy Scholar:</i>	Top ten students in the class after two semesters
<i>Butler Scholar:</i>	Top ten students in the class after four semesters
<i>Florence Allen Scholar:</i>	Top 10% of the class after four semesters
<i>Robert McKay Scholar:</i>	Top 25% of the class after four semesters

Named scholar designations are not available to JD students who transferred to NYU School of Law in their second year, or to LLM students.

#### Missing Grades

A transcript may be missing one or more grades for a variety of reasons, including: (1) the transcript was printed prior to a grade-submission deadline; (2) the student has made prior arrangements with the faculty member to submit work later than the end of the semester in which the course is given; and (3) late submission of a grade. Please note that an In Progress (IP) grade may denote the fact that the student is completing a long-term research project in conjunction with this class. NYU School of Law requires students to complete a Substantial Writing paper for the JD degree. Many students, under the supervision of their faculty member, spend more than one semester working on the paper. For students who have received permission to work on the paper beyond the semester in which the registration occurs, a grade of IP is noted to reflect that the paper is in progress. Employers desiring more information about a missing grade may contact the Office of Records & Registration (212-998-6040).

#### Class Profile

The admissions process is highly selective and seeks to enroll candidates of exceptional ability. The Committees on JD and Graduate Admissions make decisions after considering all the information in an application. There are no combination of grades and scores that assure admission or denial. For the JD Class entering in Fall 2021 (the most recent entering class), the 75th/25th percentiles for LSAT and GPA were 174/170 and 3.93/3.73.

Updated: 10/4/2021

**New York University***A private university in the public service*

School of Law

40 Washington Square South, Room 314F

New York, NY 10012-1099

Telephone: (212) 998-6033

Facsimile: (212) 995-4341

E-mail: [katrina.wyman@nyu.edu](mailto:katrina.wyman@nyu.edu)**Katrina M. Wyman***Sarah Herring Sorin Professor of Law**Director, Environmental and Energy Law LLM Program*

May 16, 2023

**RE: Connor Fraser, NYU Law '23**

Your Honor:

I write to strongly recommend Connor Fraser for a clerkship. Connor was a student in my 1L Property class in the spring of 2021, and Natural Resources Law & Policy seminar in the spring of 2023. From May 2021 to January 2022, Connor worked as a research assistant for me and the Guarini Center on Environmental, Energy & Land Use Law that I direct. I was so impressed by Connor that I nominated him for a graduation prize, the Maurice Goodman Memorial Prize for scholarship and character, which Connor was awarded by the law school.

Connor was selected through a competitive process by the Guarini Center to be the Paul & Marie Napoli Student Fellow in Environmental Law & Policy. Connor was an amazing Napoli fellow. His most important work concerned the potential to use litigation to address the problem of plastics pollution. He produced two articles on litigation strategies that might be used to reduce plastics pollution, and he is publishing both of these articles as student notes.

His article “The Plastic Public Nuisance: Life in Plastic, Not So Fantastic,” which will be published in the N.Y.U. Law Review, analyzes the potential to sue plastics producers for public nuisance. Drawing on a suit against plastic producers in California, Connor outlines two theories under which plastic producers might be sued in New York for public nuisance. The article offers a succinct analysis of public nuisance law in New York and its potential utility in dealing with plastics pollution. The article is well researched and superbly structured.

“Recycled Misrepresentation: Plastic Products, Consumer Protection Law & Attorneys General,” which will be published in the N.Y.U. Environmental Law Journal, argues that the New York State Attorney General should sue plastic producers and retailers under the state’s General Business Law for misleading representations about the recyclability of plastics. This article began as a paper that Connor wrote for a seminar on Government Lawyering at the State Level taught by Bethany Davis Noll. The article surveys the litigation that nonprofits have brought in various states against plastics producers. It then goes through the elements that the NYS Attorney General would need to establish under the General Business Law, and emphasizes the benefits of her attempting to bring this type of litigation to reduce plastic pollution. This article underscores Connor’s strengths in pulling together information from a range of sources, and his interest in legal analysis, as the paper discusses the NYS General Business Law, case law

Connor Fraser, NYU Law '23  
May 16, 2023  
Page 2

under it, and consumer protection litigation against the plastics industry in various states. I read many student papers and this is one of the very best I have read in recent years. Bethany was so impressed by Connor's research that she had him present it to environmental attorneys working for state attorney generals.

In addition to researching and writing these two articles, Connor contributed case law research and analysis to a plastics litigation tracker that the Guarini Center and the State Energy & Environmental Impact Center at NYU created to monitor litigation concerning plastics. Connor was mentioned by name in a January 2023 article in the Financial Times in connection with his work on the plastics litigation tracker. This is a remarkable achievement for a law student, and demonstrates the importance of his work.

Upon graduation, Connor will be working as a law clerk/honors attorney at the Federal Energy Regulatory Commission's Office of Administrative Law Judges. I am confident that he will be an excellent attorney. Before coming to NYU Law, he worked for three years at Barclays Capital in increasingly senior positions. Perhaps in part because of this experience in a demanding professional environment, Connor presents his work in a highly organized manner, and anticipates and addresses research questions.

In sum, I strongly urge you to consider Connor for a clerkship. He has been fabulous to work with, and his legal research and writing skills are very strong. Notably, in addition to his studies and research work, Connor undertook many extra-curricular activities at NYU Law. For example, as 3L, he was Executive Editor of the N.Y.U. Law Review. He was 1L representative and Career and Speakers Chair for the student-run Environmental Law Society. He was a member of the Public Interest Law Student Association's 2L working group, and a member of the OUTLaw LGBT Students Association.

Please let me know if I can be of further help as you select your clerks.

Sincerely,



Katrina M. Wyman



HON. SYLVIA O. HINDS-RADIX  
*Corporation Counsel*

THE CITY OF NEW YORK  
**LAW DEPARTMENT**  
100 CHURCH STREET, ROOM 6-146  
NEW YORK, NY 10007-2601

HILARY MELTZER  
*Chief, Environmental Law Division*  
hmeltzer@law.nyc.gov

June 13, 2022

**RE: Connor Fraser, NYU Law '23**

Your Honor:

A few weeks ago, I told a colleague that we had gotten permission to hire an attorney for our Division. He responded, "couldn't we just hire Connor?"

Connor spent his first year summer as an honors intern in the Environmental Law Division of the New York City Law Department and returned a few months later for a part-time externship in the spring semester 2022, when he was a student in the clinic I co-teach at NYU Law School, Representing the City. Both times, everyone who worked with him was impressed, finding his work efficient, thorough, and polished. Throughout the time I have worked with Connor, he has consistently shown a combination of warmth, diligence, and intellectual acumen that would make him invaluable in any legal professional setting and, in particular, as a judicial clerk.

Over the summer, Connor wrote an excellent research memo about a complicated issue under the State Environmental Quality Review Act involving a highly sensitive and political situation. Frankly, this was an assignment we would not usually have given a first year intern, but the Division was swamped and understaffed. Connor's research and analysis were thorough and sophisticated – well beyond what we generally would expect of a first year intern. Even more importantly, his judgment was impeccable: Connor's memo answered the exact questions we asked, but also noted unexpected nuances of the issue that he correctly judged we would need to know about.

For the clinic, Connor chose to return to the Environmental Law Division, seeking to deepen his engagement with work he already knew he found interesting. And that is exactly what happened: over the semester, he took on increasingly challenging assignments, culminating in an entire motion to dismiss, which he drafted beautifully – again, exceeding our expectations.

In addition to the externship, the class meets for a 2-hour seminar, focusing each week on a different set of legal issues the City is facing, generally with one or more guests

Connor Fraser, NYU Law '23  
June 13, 2022  
Page 2

from the Law Department or other City agencies. Over the course of the semester, we look at these various issues in the context of broad themes such as the City's role, powers, and constraints in relation to the State and federal governments; who the Law Department's clients are; and the roles of the Law Department and other City offices and agencies in promoting justice and sustainability. Connor was one of the most active and thoughtful participants in these conversations. He was always well prepared, asking thoughtful questions and offering perceptive comments, often finding subtle links among points raised during different sessions in very different contexts. When the class divided into breakout groups, Connor was consistently the spokesperson for whichever group he was in.

As their final project, students in the class prepare a "pitch" identifying a problem and proposing a solution that lawyers for the City might advocate for. They present their pitches to experienced City lawyers and incorporate feedback into their final papers. Connor chose to work with a classmate on a collaborative project – an ambitious proposal to facilitate renewable energy production at City facilities. Their proposal is thoughtful and nuanced, drawing from principles and examples discussed throughout the semester. In their presentation, Connor and his classmate worked well together, alternating as they explained each element of their proposal. The final paper is sophisticated and far-reaching, identifying both legal and political issues and suggesting practical resolutions.

Connor stands out among the many students I have worked with over the past thirty years for his achievements both in the classroom and at the Law Department. I wholeheartedly recommend him for a clerkship. Please feel free to call me if you have any questions.

Sincerely,

/s/

Hilary Meltzer, Chief  
Environmental Law Division



State Energy &  
Environmental Impact Center  
NYU School of Law

April 24, 2023

**RE: Connor Fraser, NYU Law '23**

Your Honor:

I am the Executive Director of the State Energy & Environmental Impact Center and an Adjunct Professor at NYU School of Law. I am writing to give my highest recommendation for Connor Fraser for a clerkship in your chambers. Before coming to NYU, I worked at Debevoise & Plimpton for five years, clerked twice, and worked in the Appeals Division of the NY Attorney General's office. In all that time, I never had a student submit work that was so professional and well-done as Connor.

I first got to know Connor when he took my class in the spring of 2022. The class is about the theory and practice of government lawyering, with a focus on state Attorneys General and Connor wrote a paper that was directly relevant to topics that are actively being researched and litigated in a number of AG offices right now. As a result, I asked him to provide a briefing on his research to a working group of AG staff focused on the topic. His presentation was excellent! With minimal comments and advice from me, he provided a presentation that was professional and informative. After that, I invited him to present with me at a global webinar hosted by Client Earth. There, he presented research he had done for the Paul & Marie Napoli Student Fellowship in Environmental Law & Policy. Again, he did an excellent job. All I had to do was introduce him and he took care of the rest.

His research is so interesting that I also invited him to write several pieces on it, which we published in my Center's blog and newsletter. One piece was a very informative issue brief about the way that state law incorporates the Federal Trade Commission's environmental marketing guidelines. He presented that research to an AG working group and after his presentation one attorney on the call said that his research had "blown hers out of the water." Another attorney asked me to "send over anything Connor Fraser writes." I was pleased to see his work in my class translate into something that was directly useful to current policy debates.

As a result of his excellent work, I nominated Connor for the law school's Maurice Goodman Memorial Prize. This prize is awarded for outstanding academic achievement and scholarship. The recipient is someone who had demonstrated a "passion for the law through intense study of a subject area resulting in publication in a scholarly journal" and who "exhibits the promise to become a thought leader within the legal community." Connor's work with me led him to write several publications and presentations which will help fuel real policy change.

The State Energy & Environmental Impact Center  
New York University School of Law • Wilf Hall, 139 MacDougal St., 1st Fl. • New York, NY 10012  
stateimpactcenter@nyu.edu

Connor Fraser, NYU Law '23  
April 24, 2023  
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He is highly deserving of this award and I'm so pleased that the law school did indeed recently decide to award it to him.

Connor's grades include several very good grades in difficult classes, including contracts, constitutional law, and energy law. Though he has some Bs, those are also good grades. I gave him an A because he earned it through hard work in the class and because he did an excellent job with his paper. He is the kind of student who digs in to obtain a comprehensive understanding of a problem and then prepares a reliable analysis of it.

In my experience, to succeed at a clerkship, the clerk needs to have strong writing skills, be able to provide trustworthy legal analysis, and be willing to conduct careful and comprehensive research. Based on my experience with his work, Connor will meet and exceed that standard. I truly believe that Connor will be a wonderful asset to the profession and to your chambers if you decide to hire him as a clerk.

I am very happy to answer any questions about Connor. I can be reached at 646-612-3458; bethany.davisnoll@nyu.edu.

All my best,

A handwritten signature in black ink, appearing to read 'Bethany', with a stylized flourish extending from the end.

Bethany Davis Noll

## **WRITING SAMPLE**

**CONNOR J. FRASER**

New York University School of Law  
J.D. Class of 2023

***Haaland v. Brackeen*, No. 21-376**

**Majority Opinion**

May 11, 2023

27 pages

The following writing sample is an excerpt from the final assignment I submitted for my seminar, Supreme Court Simulation. My assignment was to draft a majority opinion that resolved the issues in *Haaland v. Brackeen*, No. 21-376, which is currently pending before the Court. The opinion is based on my own assessment of the briefing and oral argument in the case, as well as class discussion. This excerpt focuses on the equal-protection challenge to key sections of the Indian Child Welfare Act (ICWA) (pages 11–26).

Please note that this writing sample is my own work product and has not been edited by any other person. It reflects only general discussion with my professors of the legal issues in the case. I am happy to provide the full opinion on request.

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**SUPREME COURT OF THE UNITED STATES**

DEB HAALAND, SECRETARY, UNITED STATES DEPARTMENT OF  
THE INTERIOR, ET AL. v. CHAD EVERET BRACKEEN, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES  
COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 21-376. Argued November 9, 2022—Decided May 11, 2023\*

JUSTICE FRASER delivered the opinion of the Court.

Congress enacted the Indian Child Welfare Act of 1978 (ICWA) in response to abusive child welfare practices at the state level. Public and private agencies were separating large numbers of Indian children from their families and tribes through adoption or foster care placements, often in non-Indian homes. This trend represented an existential threat to Indian tribes. ICWA therefore establishes federal standards for state child-custody proceedings that operate to protect the best interests of Indian children and keep them within their tribal communities. In the process, ICWA promotes tribal integrity and sovereignty. More than forty years later, a group of non-Indian adoptive and foster parents, as well as one state, attack the core elements of ICWA’s statutory scheme on Article I, anti-commandeering, and equal-protection grounds. This case requires us to decide whether ICWA exceeds Congress’s authority or draws unconstitutional classifications. We hold that it does neither.

**I. BACKGROUND & PROCEDURAL HISTORY****A. ICWA’s Provisions**

ICWA, 25 U.S.C. § 1901 *et seq.*, regulates the removal and out-of-home placement of Indian children. Congress found that “nontribal public and private agencies” were breaking up an “alarmingly high percentage of Indian families” through unwarranted removal of their children. 25

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\* Together with *Cherokee Nation v. Brackeen*, No. 21-377; *Texas v. Haaland*, No. 21-378; and *Brackeen v. Haaland*, No. 21-380, all on writs of certiorari to the same court.

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U.S.C. § 1901(4). This practice threatened the “continued existence and integrity of Indian tribes.” 25 U.S.C. § 1901(3). So, drawing on its “plenary power over Indian affairs” and “other constitutional authority,” Congress decided to act by passing ICWA. 25 U.S.C. § 1901(1).

Under ICWA, an “Indian child” is an “unmarried person who is under age eighteen and is either (a) a member of an Indian tribe or (b) is eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe.” 25 U.S.C. § 1903(4). An “Indian tribe,” in turn, means a “tribe, band, nation, or other organized group or community of Indians recognized as eligible for services provided to Indians by the Secretary [of the Interior]” because of their status. 25 U.S.C. § 1903(3), (8), (11).

ICWA generally grants exclusive jurisdiction to tribes for child-custody proceedings involving Indian children who live on reservations. 25 U.S.C. § 1911(a). It then grants concurrent jurisdiction to tribal courts and state courts over all other child-custody proceedings. 25 U.S.C. § 1911(b). For proceedings in state court, ICWA establishes minimum federal standards for both the *removal* of Indian children from their families and the *placement* of those children in foster or adoptive homes. First, the removal standards require that any party seeking an Indian child’s removal notify the child’s parents, Indian custodian, or tribe. 25 U.S.C. § 1912(a). They also prohibit the state court from ordering removal unless it makes findings—based on “clear and convincing evidence,” supported by the testimony of “qualified expert witnesses”—that the child’s current custody arrangement (with a parent or Indian custodian) “is likely to result in serious emotional or physical damage to the child.” 25 U.S.C. § 1912(e), (f). The party attempting to remove an Indian child must “satisfy the court that active efforts have been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family.” 25 U.S.C. § 1912(d).

Second, the placement standards set out a hierarchy of placement preferences for adoptions, foster care arrangements, or preadoptive arrangements. For adoptive proceedings, a “preference” is

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given to placing the child with “(1) a member of the child’s extended family; (2) other members of the Indian child’s tribe; or (3) other Indian families” in the absence of “good cause to the contrary.” 25 U.S.C. § 1915(a). Similarly, for foster care or preadoptive proceeding, ICWA states that there is a preference (absent “good cause” to deviate) for (i) a member of the Indian child’s extended family, (ii) a foster home chosen by the Indian child’s tribe, (iii) another approved Indian foster home, or (iv) an institution for children approved by an Indian tribe or operated by an Indian organization. 25 U.S.C. § 1915(b). In both removal and placement proceedings, however, if the Indian child’s tribe establishes “a different order of preferences by resolution, the agency or court effecting the placement shall follow such order so long as the placement is the least restrictive setting appropriate to the particular needs of the child.” 25 U.S.C. § 1915(c).

ICWA also includes recordkeeping requirements. The state in which an Indian child’s placement was made must maintain records of the placement and make those records available upon request to the Secretary of the Interior or the child’s tribe. 25 U.S.C. § 1915(e). A state court entering a final decree in an adoptive placement shall provide the Secretary with a copy of the decree or order and specific information relating to the placement. 25 U.S.C. § 1951(a). That information includes the name and tribal affiliation of the child and identifying information for both the biological and adoptive parents. *Id.*

The Board of Immigration Appeals (BIA), within the Department of the Interior (DOI), promulgates rules and regulations to assist states in implementing ICWA. The BIA promulgated its most recent regulations in 2016. Those regulations clarified the minimum federal standards governing the implementation of ICWA to ensure “[ICWA] is applied in all States consistent with the Act’s express language, Congress’s intent in enacting the statute, and to promote the stability and security of Indian tribes and families.” Indian Child Welfare Act Proceedings, 81 Fed. Reg. 38,778, 38,868 (June 14, 2016) [hereinafter 2016 Final Rule] (codified at 25 C.F.R. § 23.101 *et*

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*seq.*). Unlike prior BIA regulations, the 2016 Final Rule has binding effect. *Id.* at 38,782. It also restated ICWA’s placement preferences, clarified when states may depart from those preferences for “good cause,” and elaborated on the notice and recordkeeping requirements for states. *Id.* at 38,778, 38,874–75, 38,875–76 (codified at 25 C.F.R. § 23.140–41).<sup>1</sup>

### **B. The Instant Action**

This case involves three non-Indian couples who wished to adopt Indian children.

In 2017, Chad and Jennifer Brackeen sought to adopt A.L.M. The couple had been fostering A.L.M. after Texas Child Protective Services removed him from his family’s care. The Navajo Nation then intervened in the Brackeens’ state adoption proceedings pursuant to ICWA. A.L.M. is an “Indian child” because he is eligible for membership in an Indian tribe and his biological mother and father are enrolled members of the Navajo Nation and Cherokee Nation, respectively. The Brackeens argued that “good cause” existed to depart from ICWA’s placement preference for other members of the Navajo Nation (A.L.M.’s tribe for ICWA purposes). However, the state court concluded that ICWA required the denial of the Brackeen’s petition, and only an emergency stay of removal from the Texas court prevented A.L.M.’s removal to a placement with unrelated tribal members. The Brackeens then successfully adopted A.L.M. in 2018. They are now in the process of adopting Y.R.J., A.L.M.’s sibling (who is also an “Indian child” under ICWA). The Navajo Nation has again intervened in the adoption proceedings and recommended a placement with an extended family member. The Texas state trial court hearing the Brackeen’s current case declared that ICWA was inapplicable as a violation of the Texas Constitution, but it “conscientiously

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<sup>1</sup> As the Petitioners do not challenge the 2016 Final Rule on any ground independent of the underlying statute’s constitutionality, and we granted certiorari only on the questions presented related to the text of ICWA, the validity of the 2016 Final Rule is not squarely before this Court. We therefore address only the constitutional issues raised, briefed, and argued before us because their resolution is sufficient to properly dispose of this case. *See Gonzales v. Duenas-Alvarez*, 549 U.S. 183 (2007) (limiting consideration only to claims falling within the terms of the question presented); *cf. Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 246 n.12 (1981) (“We may consider questions outside the scope of the limited order when resolution of those questions is necessary for the proper disposition of the case.”).

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refrain[ed]” from ruling on the Brackeen’s adoption petition, pending the resolution of this appeal. The Court of Appeals then reversed and remanded the case on other grounds. *In re Y.J.*, No. 02-19-00235-CV, 2019 WL 6904728, at \*9 (Tex. App. Dec. 19, 2019).

Danielle and Jason Clifford attempted to adopt Child P., a now-member of the White Earth Band of Ojibwe, after fostering the child. Child P.’s maternal grandmother is a registered member of the White Earth Band. The Band intervened in Child P.’s custody proceedings and ultimately succeeded in convincing the Minnesota state court that there was no “good cause” to deviate from ICWA’s preferences for foster care and preadoptive placements. The court then denied the Clifford’s motion for adoption and placed Child P. with her maternal grandmother in 2018. The Minnesota appellate court affirmed that decision. *In re Welfare of Child of S.B.*, No. A19-0225, 2019 WL 6698079, at \*1 (Minn. Ct. App. Dec. 9, 2019), *appeal denied*, 2020 Minn. LEXIS 17, at \*1 (Minn. Jan. 9, 2020). Child P.’s grandmother later finalized her adoption of Child P.

Finally, Nicholas and Heather Libretti petitioned to adopt Baby O., whose biological father is a Yselta del sur Pueblo Tribe member and whose biological mother is Altagracia Socorro Hernandez, a non-Indian who supports the Libretti’s adoption of Baby O. Hernandez is also a Petitioner in this case. The Pueblo Tribe intervened in Baby O.’s custody proceedings, and the Libretti’s adoption was delayed but eventually finalized in 2018.

These six foster and adoptive parents, as well as Hernandez (together, the “Individual Petitioners”), challenged the constitutionality of ICWA in the U.S. District Court for the Northern District of Texas. They named several officials and federal agencies overseeing ICWA as defendants.<sup>2</sup> The States of Texas, Louisiana, and Indiana (the “State Petitioners”) also raised

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<sup>2</sup> Following official substitutions for the change in federal administration, the current defendants are Deb Haaland, in her official capacity as DOI Secretary; Bryan Newland, in his official capacity as Assistant Secretary, Indian Affairs; the Bureau of Indian Affairs (BIA); the DOI; the United States of America; Xavier Becerra, in his official capacity as Secretary of the United States Department of Health and Human Services (HHS); and the HHS (together, the “Federal Respondents”).

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constitutional challenges to ICWA and joined as plaintiffs in the district court and the Court of Appeals. And several tribes—the Cherokee Nation, the Oneida Nation, the Quinault Indian Nation, and the Morongo Band of Mission Indians (together, the “Tribal Respondents”)—intervened as defendants at the district court.

The Individual and State Petitioners challenged the constitutionality of ICWA and the statutory and constitutional validity of the 2016 Final Rule on several grounds. They both alleged that Congress lacked the authority to enact ICWA and that ICWA and the 2016 Final Rule<sup>3</sup> unconstitutionally commandeer state courts and agencies in violation of the Tenth Amendment. In addition, they asserted that ICWA Section 1915(a)–(b) and related sections of the 2016 Final Rule rely on racial classifications that violate the equal-protection component of the Fifth Amendment’s due process guarantee. The State Petitioners alone argued that ICWA Section 1915(c) and related sections of the 2016 Final Rule violate the nondelegation doctrine. And the Individual Petitioners alone asserted that ICWA and the 2016 Final Rule violate the Fifth Amendment by infringing on the fundamental right of adoptive parents to make decisions concerning their children.

Defendants argued that the Petitioners lack standing and moved to dismiss. The district court disagreed and denied their motion. *Brackeen v. Zinke*, No. 4:17-cv-00868-O, 2018 WL 10561971 (N.D. Tex. July 24, 2018). The district court then considered the Petitioners’ motion for summary judgment and generally agreed with their arguments. The court reasoned that ICWA is facially unconstitutional because it generally regulates beyond the scope of the Indian Commerce Clause and because specific provisions (setting minimum federal standards and recordkeeping requirements) unconstitutionally direct state courts to administer federal law in cases involving state

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<sup>3</sup> The Petitioners separately argued that the 2016 Final Rule is invalid and should be set aside as an unconstitutional and unlawful exercise of the BIA’s authority under the Administrative Procedure Act (APA), or otherwise one beyond the BIA’s statutory authority. *Brackeen v. Zinke*, 338 F. Supp. 3d at 541.

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law causes of action. *Brackeen v. Zinke*, 338 F. Supp. 3d 514, 541, 546 (N.D. Tex. 2018). ICWA violates equal protection because it employs racial classifications subject to strict scrutiny, and its definitions and placement preferences are not narrowly tailored. *Id.* at 536. ICWA Section 1915(c) also unconstitutionally delegates congressional power to Indian tribes. *Id.* at 541. And the Final Rule was invalid under the APA because it implements all of these unconstitutional provisions. *Id.* at 542. The district court disagreed with the Individual Petitioners only on their last argument. By reasoning that this Court had not applied cases recognizing fundamental family rights to foster families or adoptive parents, the district court denied the substantive due process claim. *Id.* at 546 (citing *Troxel v. Granville*, 530 U.S. 57 (2000); *Moore v. City of East Cleveland*, 431 U.S. 494 (1977)). The district court therefore granted in part and denied in part the Petitioners' motions for summary judgment. *Id.* at 546.

### C. The Opinion Below

The parties appealed,<sup>4</sup> and the Fifth Circuit panel initially reversed on the merits and rendered summary judgment for the Respondents. *Brackeen v. Bernhart*, 937 F.3d 406, 414 (5th Cir. 2019). The panel determined that the Petitioners possess Article III standing to challenge ICWA and the Final Rule, partly affirming the district court. *Id.* at 421. The Petitioners then asked the Fifth Circuit for rehearing en banc, which the court granted. *Brackeen v. Bernhart*, 942 F.3d 287 (5th Cir. 2019). On rehearing, the Fifth Circuit in part reversed and in part affirmed—in many respects by an equally divided vote—the district court. *Brackeen v. Haaland*, 994 F.3d 249, 269 (5th Cir. 2021)

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<sup>4</sup> The Fifth Circuit stayed the district court's order pending appeal. *Brackeen v. Bernhart*, 937 F.3d 406, 420 (5th Cir. 2019). The Individual Petitioners did not appeal the district court's denial of their substantive due process claim, *id.* at 419 n.3. We express no opinion on the merits of the Individual Petitioners' substantive due process claim.

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(en banc) (per curiam). No one opinion garnered an en banc majority.<sup>5</sup> Instead, the Fifth Circuit’s conclusions varied by issue.

First, the Fifth Circuit affirmed that at least one Petitioner has standing to bring each of the Petitioners’ claims. The court was unanimous in holding that at least one Petitioner has standing to challenge ICWA on Article I, anti-commandeering, and non-delegation grounds and the 2016 Final Rule under the APA. *Id.* at 267. The court was equally divided on whether all of the Petitioners have standing to challenge on equal-protection grounds certain sections of ICWA—Section 1913 (standards for parental rights in terminations, foster care, and adoptive placements) and Section 1914 (right to petition court to invalidate termination/placement actions). *Id.* The constitutionality of those sections is not before us on appeal. However, a majority of the court affirmed the Petitioners’ standing to challenge other ICWA sections on equal-protection grounds. *Id.*; *see id.* at 293–96 (Dennis, J.).

Second, a majority of the Fifth Circuit held that most provisions of ICWA are constitutional. The court held that Congress had the authority to enact ICWA under the Indian Commerce Clause. *See id.* at 299–316 (Dennis, J.); *id.* at 452–56 (Costa, J.). It determined that *most* of ICWA’s provisions setting standards and requirements for the states present no anti-commandeering problems. *Id.* at 413–45 (Duncan, J.). These valid provisions include the sections of ICWA providing for a right to counsel in child-custody proceedings, for example. The Fifth Circuit held that ICWA draws political, not racial classifications, and that its definition of “Indian child” and first- and second-ranked placement preferences do not violate equal protection. *Id.* at 332–46 (Dennis, J.) (excluding discussion of third-ranked placement preferences). The court also found that

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<sup>5</sup> The court provided an issue-by-issue summary of its holdings, which corresponded to specific sections of Judge Dennis’s, Judge Duncan’s, or Judge Costa’s opinions. Chief Judge Owen, Judge Wiener, Judge Haynes, and Judge Higginson also each wrote separately, for a total of seven separate opinions.

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Section 1915(c) does not violate the nondelegation doctrine but permissibly incorporates the laws of a separate sovereign. *Id.* at 346–52 (Dennis, J.).

Third, the Fifth Circuit affirmed, by either a majority or equally divided vote, that *certain* ICWA provisions unconstitutionally commandeer state agencies and courts. A majority concluded that the “active efforts” requirement in Section 1912(d), the “qualified expert witnesses” requirements in Section 1912(e) and (f), and the placement records requirement in Section 1915(e) each impermissibly direct state governments to implement a federal program. *Id.* 403–09, 410–12 (Duncan, J.) (excluding discussions of Section 1915(a), (b)); *id.* at 415–16 (Duncan, J.) (including only the discussion of Sections 1912(d)–(f), 1915(e)). The court was split on the issues of whether the Section 1912(a) notice requirement and the Section 1915(a) and (b) placement preferences commandeer state agencies and whether the Section 1951(a) decree disclosure requirement commandeers state courts. *Compare id.* at 322–32 (Dennis, J.), *with id.* at 406–07, 409 (Duncan, J.). This split affirmed, without precedent, the district court’s opinion that those specific provisions are unconstitutional as applied to state agencies or courts. But a majority still held that the placement preferences and placement and termination standards validly preempted state law when applied only to state courts. *Id.* at 316–322 (Dennis, J.); *id.* at 416–19 (Duncan, J.).

Fourth, the Fifth Circuit affirmed by equally divided vote the district court’s conclusion that the third-ranked placement preferences violate equal protection. *Compare id.* at 332–46 (Dennis, J.), *with id.* at 400–01 (Duncan, J.). The preferences for “other Indian families” in adoption placements (Section 1915(a)(3)) and for “Indian foster home[s]” in foster care placements (Section 1915(b)(iii)) do rationally advance the government’s goal of promoting the continued existence and integrity of a child’s tribe by placing that child with a *different* tribe. *Id.* at 400 (Duncan, J.).

Finally, a majority of the Fifth Circuit declared the 2016 Final Rule invalid to the extent it implements unconstitutional provisions that commandeer state agencies and courts. *Id.* at 425, 429–

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31 (Duncan, J.). Otherwise, the 2016 Final Rule was constitutional, and the BIA did not violate the APA in issuing binding regulations to state courts. *Id.* at 353–58 (Dennis, J.).

Both sides petitioned this Court for review.<sup>6</sup> We granted certiorari in No. 21-376 and consolidated that case with the other related appeals (Nos. 21-377, 21-378, and 21-380).

## II. SUMMARY

We granted review on three questions. First, do the Individual Petitioners have Article III standing to challenge ICWA’s placement preferences for “other Indian families,” 25 U.S.C. § 1915(a)(3), and for “Indian foster home[s],” 25 U.S.C. § 1915(b)(iii)? Second, do various provisions of ICWA—namely, the minimum standards, 25 U.S.C. § 1912(a), (d), (e), (f); placement preferences, 25 U.S.C. § 1915(a), (b); and record-keeping provisions, 25 U.S.C. §§ 1915(e), 1951(a)—violate the anti-commandeering doctrine of the Tenth Amendment? Third, are Section 1915(a)(3) and (b)(iii) rationally related to legitimate governmental interests and therefore consistent with equal protection?

We begin by addressing whether the Petitioners have Article III standing to assert each of their ICWA challenges. We hold that only some of the Petitioners’ claims are justiciable. At least one of the Individual Petitioners has standing to challenge each of the first- and second-ranked placement preferences on equal-protection grounds. However, none of the Individual Petitioners have standing to challenge the third-ranked placement preferences, 25 U.S.C. § 1915(a)(3), (b)(iii), because those placement preferences were inapplicable to their state child-custody proceedings. *See infra* Section III.A. Texas also establishes standing to assert its anti-commandeering claims based on economic injuries from a likely loss of federal funding. But we conclude that Texas lacks standing to pursue both its equal-protection and nondelegation claims, as it fails on both counts to

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<sup>6</sup> The States of Indiana and Louisiana and the Navajo Nation did not seek review of the Fifth Circuit’s en banc decision.

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establish a concrete and particularized injury in fact. *See infra* Section III.B. We therefore rule only on the merits of Petitioners’ justiciable anti-commandeering and equal-protection claims.

Next, we address the main issues on the merits: (1) whether ICWA is a valid exercise of Congress’s authority, (2) whether parts of ICWA violate the anti-commandeering doctrine, and (3) whether parts of ICWA violate equal protection. First, we hold that ICWA is a constitutional exercise of Congress’s plenary power over Indian affairs that reasonably advances the national government’s unique obligations to Indian tribes. *See infra* Section IV. Second, the challenged provisions of ICWA do not impermissibly commandeer state courts or agencies. Instead, they impose restrictions and confer rights on private parties under federal law. State courts must apply that preemptive federal law per the Supremacy Clause, and other state actors must abide by ICWA’s evenhanded regulations. *See infra* Section V. Third, ICWA’s “Indian child” definition and first- and second-ranked placement preferences do not violate equal protection. The definition and preferences each receive rational basis review because they contain political classifications linked to membership in a federally recognized tribe. They rationally further Congress’s legitimate purpose of protecting Indian children from unwarranted removals, thereby preserving tribal integrity and promoting tribal sovereignty. *See infra* Section VI.

\* \* \*

## VI. EQUAL PROTECTION

The Petitioners allege that ICWA’s “Indian child” definition and first- and second-ranked placement preferences draw impermissible racial classifications. We disagree. ICWA’s classifications rely on membership in a federally recognized Indian tribe, a paradigmatic political classification. And the classifications rationally further Congress’s legitimate purpose of protecting Indian children from unwarranted removals in state child-custody proceedings, thereby preserving tribal integrity and promoting tribal sovereignty. We affirm the en banc Fifth Circuit’s judgment

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that ICWA's "Indian child" definition and first- and second-ranked placement preferences do not violate the Fifth Amendment.

#### **A. Rational Basis Is the Appropriate Level of Scrutiny**

The Fifth Amendment's equal-protection component of due process bars "invidious racial discrimination" and other irrational classifications by the federal government. *United States v. Vaello Madero*, 142 S. Ct. 1539, 1541 (2022); *Morton v. Mancari*, 417 U.S. 535, 551 (1974). If ICWA's "Indian" classifications are political classification, they must be "tied rationally to the fulfillment of Congress's unique obligation toward the Indians," a form of rational basis review. *Mancari*, 417 U.S. at 555; *see also City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 440 (1985). If we were instead to find that ICWA's classifications were racial classifications, as we have done in only a unique set of cases, they would be subject to strict scrutiny. *Mancari*, 471 U.S. at 551; *Rice v. Cayetano*, 528 U.S. 495, 517 (2000).

##### **(i) "Indian" Classifications Predominately Operate as Political Classifications**

We have repeatedly held that "Indian" classifications are political classifications in all but a limited number of scenarios. Our precedent is consistent with a textual and historical understanding of the distinct status of Indian tribes in our constitutional structure. The Constitution "singles Indians out" as a political community and the "proper subject of legislation." *Mancari*, 417 U.S. at 555. In Article I, the Constitution reflects this understanding by placing "Indian tribes" alongside other separate sovereigns, foreign nation and states. U.S. CONST. art. I, § 8, cl.3. In Articles II and VI, the Constitution makes Treaties the "supreme law of the land" and thereby "sanction[s] the previous treaties with the Indian nations, and, consequently, admits their rank among those powers who are capable of making treaties." *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 559 (1832); *see* U.S. CONST. art. II, § 2, cl.2; art. VI, § 1, cl.2. Indian tribes therefore possess a "unique status," as we noted in our evaluation of Congress's plenary powers over Indian affairs. *Nat'l Farmers Union Ins. Cos. v.*

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*Crow Tribe of Indians*, 471 U.S. 845, 851 (1985); *see supra* Section IV.A. Congress has also enacted legislation relying on “Indian” classifications since the Constitution’s ratification, including the Trade and Intercourse Acts, the Major Crimes Act, and acts for “educating” Indian children. *See supra* Section III.A.

In the fundamental case of *Morton v. Mancari*, we upheld a preference in favor of “Indians” for filling vacancies within the BIA. 417 U.S. at 555. The classification applied to members of federally recognized tribes and operated “to exclude many individuals who are racially to be classified as ‘Indians.’” *Id.* at 554. The BIA’s preference was constitutional because it was reasonably designed to support tribes’ participation in their own self-government and make the BIA more responsive to the needs of tribes—i.e., to “fulfill[] Congress’s unique obligations toward the Indians.” *Id.* at 554–55. While the *Mancari* Court noted the BIA’s unique role in governing tribal members and the preference’s limited scope, *id.* at 542, 553 n.24, 554, it left open the idea that preferences for Indians in other areas of government could be constitutional political classifications.<sup>7</sup>

Shortly after *Mancari*, in *United States v. Antelope*, we reasoned that “classifications expressly singling out Indian *tribes* as subjects of legislation are expressly provided for in the Constitution and supported by the ensuing history of the Federal Government’s relations with Indians.” 430 U.S. 641, 645 (1977) (emphasis added). We then rejected an equal-protection challenge to the Indian classification in the Major Crimes Act, 18 U.S.C. § 1153, which defines criminal jurisdiction for any “Indian” who commits certain crimes against another Indian “within Indian country.” *Id.* at 647–48. In addition to *Mancari* and *Antelope*, we have reiterated that “Indian” is a political classification subject to rational basis review in other cases involving challenges to

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<sup>7</sup> The Court stated that the hiring preference at issue in *Mancari* did not cover any government agency or activity besides the BIA, and we did not remark on the “obviously more difficult question that would be presented by a blanket exemption for Indians from all civil service examinations.” *Mancari*, 417 U.S. at 554.

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statutes providing for exclusive tribal jurisdiction over tribal adoptions, tribal immunity from certain state taxes, and treaty-provided fishing rights available to Indians but not available to non-Indians. *See Fisher v. District Court*, 424 U.S. 382, 390–91 (1976) (per curiam); *Moe v. Confederated Salish & Kootenai Tribes of the Flathead Rsr.*, 425 U.S. 463, 480 (1976); *Washington v. Wash. State Com. Passenger Fishing Vessel Ass’n*, 443 U.S. 658, 673 (1979).

Petitioners’ argue that our cases have only upheld statutes involving Indian classifications when they “single out for special treatment a constituency of tribal Indians living *on or near reservations*.” *Mancari*, 417 U.S. at 552 (emphasis added). That statement is inconsistent with our precedent and the facts of *Mancari*—the BIA hiring preference applied regardless of whether tribal members lived or worked on a reservation. *Id.* at 538 n.3 (“The new policy provides as follows: Where two or more candidates who meet the established qualification requirements are available for filling a vacancy. If one of them is an Indian, he shall be given preference in filling the vacancy.”). We have also upheld several statutes that rely on Indian classifications and regulate off-reservation. *See, e.g., Fishing Vessel Ass’n*, 443 U.S. at 673 n.20 (applying *Mancari* to Indian classification applicable off Indian land); *see also United States v. McGowan*, 302 U.S. 535, 539 (1938); *United States v. Forty-three Gallons of Whiskey*, 93 U.S. 188, 194–95 (1876).

***(ii) Classifications with No Connection to Tribal Membership Are a Limited Exception***

In a small number of cases, we have held or suggested that Indian classifications function as impermissible racial classifications. In all of these cases, however, one key factor was *not* present: a link between the classification and membership in a federally recognized tribe. That link is a critical feature of classifications designed to “fulfill[] Congress’s unique obligations toward the Indians.” *Mancari*, 417 U.S. at 555. Without it, the classifications were unconstitutional.

First, in *Wygant v. Jackson Board of Education*, a plurality of the Court held that a provision in public school teachers’ collective bargaining agreement violated the Fourteenth Amendment. 476

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U.S. 267, 273–74 (1986) (plurality). The provision contained a preference that “operate[ed] against whites and in favor of certain minorities,” including “those employees who are . . . American Indian,” *id.* at 270 n.2, without any explicit connection to tribal membership. We held that the provision was an impermissible racial classification. *Id.* at 273. Second, in *City of Richmond v. J.A. Croson Co.*, we found that Richmond’s prime contracting plan, which required contractors awarded city contracts to subcontract a fixed portion of each contract to “Minority Business Enterprises” (MBEs), contained an unconstitutional “race-based measur[e]” for “Indians.” 488 U.S. 469, 486, 493 (1989). The city’s set-aside plan characterized MBEs as businesses owned by “minority group members,” including citizens “who are . . . Indians, Eskimos, or Aleuts.” *Id.* at 478. There was no connection between the “Indian” classification and tribal membership in the city’s plan. Third, in *Adarand Constructors, Inc. v. Peña*, we held that strict scrutiny applied to a federal program under the Small Business Act designed to provide highway contracts to disadvantaged business enterprises. 515 U.S. 200, 204–05, 213 (1995). The program’s contracting preference applied simply to “Black Americans, Hispanic Americans, *Native Americans*, Asian Pacific Americans, and other minorities,” and the program’s implementing regulations contained no link between the “Native Americans” classification and membership in a federally recognized tribe. *Id.* at 207 (emphasis added). These decisions demonstrate that a connection to tribal membership is critical for “Indian” classifications to function as political, not racial, distinctions.

Finally, in *Rice v. Cayetano*, 528 U.S. 495 (2000), we considered the constitutionality of a provision of the Hawaiian Constitution restricting voting for trustees of the state’s Office of Hawaiian Affairs. The provision limited eligible voters to persons within the statutory definition of “Hawaiian”: “any descendant of the aboriginal peoples inhabiting the Hawaiian Islands which exercised sovereignty and subsisted in the Hawaiian Islands in 1778, and which peoples thereafter have continued to reside in Hawaii.” *Id.* at 509, 515. We declined to extend *Mancari*’s rule to the

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Fifteenth Amendment challenge in *Rice* because *Rice* involved a voting scheme for a statewide office, “responsible for the administration of state laws and opportunities,” rather than a hiring and promotion preference in a federal agency devoted to Indian affairs. *Id.* at 519–20. We also suggested that the definition of “Hawaiian” was distinct from the “Indian” classification in *Mancari*. We did not decide whether “native Hawaiians have a status like that of Indians in organized tribes” (a “beginning premise[] not yet established in our case law”). *Id.* at 518–19. But the Hawaiian scheme classified citizens solely because of their ancestry and “fence[d] out whole classes of its citizens from decision-making in critical state affairs,” while the BIA preference in *Mancari* concerned “Indians in organized tribes” and excluded some persons with tribal ancestry. *Id.* at 518–19, 520, 522. Ultimately we determined that the voting scheme violated the Fifteenth Amendment.

In sum, our cases have recognized that “Indian” classifications predominately operate as political classifications. In the limited circumstances in which we concluded that a preference for Indians constituted unconstitutional racial discrimination, the preference at issue lacked any mention of or connection to tribal membership, a cornerstone of the political relationship between the federal government and Indians. *See supra* Section IV.A.

### **B. Rational Basis Review Applies to ICWA**

ICWA draws political, not racial, distinctions based on our precedent. Both prongs of the “Indian child” definition, as well as the first- and second-ranked placement preferences, rely on children’s membership in a federally recognized tribe or close connection to members of a federally recognized tribe. Analogous elements were absent from *Wygant*, *Adarand*, *J.A. Croson*, and *Rice*.

#### **(i) Definition of “Indian Child”**

The “Indian child” definition, 25 U.S.C. § 1903(4), turns on the child’s membership in a federally recognized tribe or their eligibility for membership *and* descent from a tribal member.

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First, membership itself is the result of an administrative process whereby the child and tribe establish a bilateral political relationship. Formal tribal “enrollment” began in the 1930s following Congress’s passage of the 1934 Indian Reorganization Act, 25 U.S.C. § 5101 *et seq.*, which set up the initial apparatus for tribes to apply for federally recognized status. Federal recognition is a “formal political act” that consummates the “government-to-government relationship between the tribe and federal government.” *Yellen v. Confederated Tribes of Chehalis Rsrv.*, 141 S. Ct 2434, 2440 (2021); *see also Cal. Valley Miwok Tribe v. United States*, 515 F.3d 1262, 1263 (D.C. Cir. 2008). Tribal membership then results from the child meeting the tribe’s self-determined requirements for joining its political community—set out in the tribe’s constitution or governing documents—and enrolling in the tribe through its internal administrative processes. *See generally* U.S. Dep’t of the Interior, *A Guide to Tracing American Indian & Native Alaskan Ancestry* 4–5 (2019), <https://www.bia.gov/sites/default/files/dup/assets/foia/ois/pdf/idc-002619.pdf>. There is significant variation in membership criteria across tribes and types of membership within tribes.<sup>8</sup> But tribal membership functions generally as confirmation of a child’s affiliation with a political community, not simply their possession of “immutable characteristics,” on which we have predicated heightened review. *Frontiero v. Richardson*, 411 U.S. 677, 686 (1973) (plurality); *see also Cleburne Living Ctr.*, 473 U.S. at 472 n.24 (1985) (Marshall, J., concurring in the judgment in part and dissenting in part). Tribes also possess certain powers, such as the ability to prosecute members, invoke sovereign immunity, and enter into treaties, that no racial group possesses. *Michigan v. Bay Mills Indian Cmty.*, 572 U.S. 782, 788 (2014).

<sup>8</sup> *See* COHEN’S § 3.03[2] (generalizing that “[t]oday, formal tribal membership or citizenship typically turns on descent from an individual on base list or roll, possession of a specified degree of ancestry from such an individual, domicile at the time of one’s birth, or some combination of these criteria,” as defined by a tribal constitution or tribal law). Some tribes have different citizenship classes, with certain members holding greater rights or receiving more benefits. *See, e.g.,* MUSCOGEE CONST. art. III, § 4 (permitting only “full” citizens to hold office). Many other tribes have equal-protection guarantees in their tribal constitutions but still practice elder deference, for example. *See, e.g.,* HO-CHUNK CONST. art. X, § 1(a)(8); ONEIDA NATION CONST. art. VII.

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Moreover, the notion of a “racially” Indian child does not map directly onto the “Indian child” definition. ICWA’s classification encompasses the descendants of freed enslaved persons or other adoptive members who are not “racially” Indian but are members of tribes according to the tribes’ citizenship criteria. *See, e.g.*, Treaty with the Cherokees, art. 9, July 19, 1866, 14 Stat. 799 (stating that the Cherokee Nation agreed that “all freedmen who have been liberated by voluntary of their former owners or by law, as well as all free colored persons who were in the country at the commencement of the rebellion, and are now residents therein . . . and their descendants, shall have all the rights of native Cherokees”); *Cherokee Nation v. Nash*, 267 F. Supp. 3d 86, 123 (D.D.C. 2017) (concluding that the Cherokee freedmen possess citizenship rights “to the same extent that native Cherokees have a just claim to th[ose] right[s]”). ICWA’s “Indian child” definition also excludes “racially” Indian children who are ineligible for membership in a recognized tribe or lack a biological parent who is a member of a recognized tribes (according to that tribe’s requirements). ICWA’s classification does not function as a simple proxy for a racial classification.

Second, eligibility for membership, part of the second prong of ICWA’s “Indian” child definition, similarly turns on the child’s compliance with tribe-set administrative requirements. Although the child has not undergone the administrative process necessary to receive official membership, they must still meet the relevant tribe’s citizenship criteria and deserve protection under ICWA according to Congress. 25 U.S.C. § 1901(3) (“[T]he United States has a direct interest, as a trustee, in protecting . . . [children] who are eligible for membership in an Indian tribe.”). Many tribes do not confer tribal membership automatically at birth, so children (especially very young children) rely on their parent or guardians to initiate the administrative process for them. *See* H.R. REP. NO. 95-1386, at 17. These children are likely future members of the political communities that share a common constitutional status. *See supra* Section IV.A. The extent to which ICWA’s

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classification is overinclusive—embracing “Indian” children who do not wish to maintain tribal connections in the future—is then a factor for rational basis review. *See infra* Section VI.C.

Petitioners argue that we must inquire into tribes’ own membership criteria and evaluate whether their reliance, in some cases, on the “blood quantum” of children functions as a “proxy” for race. Brief for Individual Petitioners 31–32; Brief for Texas 42. This argument first misapprehends the purpose and mechanics of purported “blood quantum” measurements. Measures of “Indian blood” do not map directly onto racial characteristics. Rather, they are the result of tribes and the federal government tracking descendants of a particular political community that existed at this country’s founding. *See* Sarah Krakoff, *They Were Here First: American Indian Tribes, Race, and the Constitutional Minimum*, 69 STAN. L. REV. 491, 535–38 (2017) (explaining the development of descent-based criteria in Indian tribes in the United States). Certificate of Degree of Indian Blood (CDIB) cards, which reflect a tribal member’s Indian “blood quantum,” are then one of the BIA’s administrative records for tracking purposes. *Establishing American Indian or Alaska Native (AI/AN) Ancestry*, DEP’T OF THE INTERIOR: INDIAN AFFS., <https://www.bia.gov/guide/tracing-american-indian-and-alaska-native-aian-ancestry> (last visited May 1, 2023). Some tribes have even “reset” their tracking of descendance fractions, reinforcing the disconnect between the idea of “blood quantum” and racial categories. *See, e.g., Red Lake Tribal Council Passes New Resolution to Change Blood Degree of Members*, RED LAKE BAND OF CHIPPEWA INDIANS (Oct. 8, 2019), <https://www.redlakenation.org/wp-content/uploads/2019/12/Red-Lake-Tribal-Council-Passes-New-Resolution-to-Change-Blood-Degree-of-Members.jpg>.

Petitioners’ arguments also impute to *Congress* any intent to discriminate—though we object to ICWA’s classifications containing any unconstitutional discrimination—based on the membership criteria set by *tribes*. That approach has not been our historical practice, where we have generally deferred to the legislative and executive branches on structuring the country’s political

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relationship with the Indian tribes. *See Holliday*, 70 U.S. 407, 419 (stating that, on Indian affairs, “it is the rule of this court to follow the action of the executive and other political departments of the government, whose more special duty it is to determine such affairs”). Tribes themselves must also comply with equal-protection principles. *See* Indian Civil Rights Act of 1968, 25 U.S.C. § 1302(8) (“No Indian tribe in exercising powers of self-government shall . . . deny to any person within its jurisdiction the equal protection of its laws or deprive any person of liberty or property without due process of law.”). Moreover, Petitioners’ arguments would enmesh this Court in the business of evaluating individual tribe’s own membership criteria in future ICWA cases, resulting in piecemeal resolution of ICWA’s constitutionality and significant future litigation. Following the lead of the political branches in overseeing the tribal recognition program and managing the country’s sovereign-to-sovereign relationship with Indian tribes is more appropriate. *See supra* Section IV.A.

Third, ICWA does not apply just to those merely eligible for tribal membership. An “Indian child” must also be the “biological child” of a tribal member. This classification relies on a direct connection between the child and their biological parent, and the political affiliation between the parent, as a tribal member, and the federally recognized tribe. Many areas of law rely on descendency requirements. *See, e.g.*, 8 U.S.C. §§ 1153(a), 1431, 1433 (federal immigration law tying U.S. citizenship and visa eligibility to, among other considerations, status as a specified relative of a U.S. citizen); 26 U.S.C. §§ 544(a)(2), 2701(b)(2)(c) (federal tax code provisions on corporate ownership and trust administration relying on a person’s status as a “lineal descendant[]” of another); 42 U.S.C. §§ 402(d), 416(e) (Social Security survivor benefits available to biological children of a beneficiary). ICWA’s use of descendency classifications on the subject of children of other sovereigns is also consistent with a tradition of regulation, *see supra* Section VI.B(iii), which bolsters the constitutionality of the “Indian child” classification.

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**(ii) Placement Preferences**

The first- and second-ranked placement preferences, 25 U.S.C. § 1915(a)–(b), similarly connect to tribal membership and, therefore, represent political classifications. The first-ranked preferences rely on tribes’ interpretations of an Indian child’s “extended family,” which account for the child’s place within a network of descendants from a common political community. *See* Krakoff, *supra*, at 535. The second-ranked preferences also rest primarily on tribal connections, now between the child and other members of the “Indian child’s tribe” or the child and foster homes connected with and approved by the child’s tribe. Both sets of preferences closely relate to the political relationships fostered by tribal membership and reflect that Indian tribes “possess[] ‘the power of regulating their internal and social relations.’” *Antelope*, 430 U.S. at 645 (quoting *United States v. Mazurie*, 419 U.S. 544, 557 (1975)).

Petitioners have argued that *Rice* imposes an additional hurdle for an “Indian” classification to receive rational basis review: it must “further Indian self-government” and apply to the “internal affair[s] of a quasi sovereign” tribe. *Rice*, 528 U.S. at 520 (quoting *Mancari*, 417 U.S. at 555)). *Rice* is formally a Fifteenth Amendment case, and we have interpreted our decisions in *Mancari* and *Fisher* to “point more broadly to the conclusion that federal regulation of Indian affairs is not based upon impermissible classifications,” even if such regulation does not address “matters of tribal self-regulation.” *Antelope*, 430 U.S. at 646. Nevertheless, ICWA’s “Indian child” definition and placement preferences both clear *Rice*’s purported hurdle.<sup>9</sup> As we discuss more fully below, ICWA aims to protect the most critical resources “to the continued existence and integrity of Indian tribes”—their future generations. 25 U.S.C. § 1901(3). One cannot self-govern or maintain internal affairs if one’s tribe ceases to exist. Congress and this Court also recognized that ICWA protects the

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<sup>9</sup> We stress that this requirement is not a mandatory bar to clear in order for an “Indian” classification to receive rational basis review. Instead, as we explain in Section VI.C, the relationship between the Indian classification and the tribe’s self-government and internal affairs is one factor in the rational basis review.

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interests of tribes *themselves*, as well as the interests of individual Indian children and families. We noted that Congress considered evidence before passing ICWA that established the “[r]emoval of Indian children from their cultural setting seriously impacts . . . long-term tribal survival.” *Holyfield*, 490 U.S. at 50 (citing S. REP. NO. 95-597, at 43 (1977)). As one example, the federal rights that Section 1912 confers apply to Indian children, their parents, *and* the relevant Indian tribes. *See supra* Section V.B.

Moreover, holding that the “Indian” classifications in ICWA are racial classifications subject to strict scrutiny would cast constitutional doubt on many other areas of federal law. An entire title of the United States Code (Title 25) is captioned “Indians,” and many other statutes rely on similar classifications. *E.g.*, 20 U.S.C. § 7441 (educational opportunities for Indian children); 42 U.S.C. § 1996 (protection of Native ceremonies and traditional rites). *Mancari* emphasized this exact point and noted that, if such laws contain “invidious racial discrimination,” Title 25 “would be effectively erased, and the solemn commitment of the Government towards the Indians would be jeopardized.” *Mancari*, 417 U.S. at 552. Federal courts would also be very busy adjudicating which, if any, of these other “Indian” classifications pass constitutional muster under the Petitioners’ expansive reading of *Rice*.

### C. ICWA’s Classifications Are Rational

As political classifications, “Indian” classifications must be “tied rationally to the fulfillment of Congress’s unique obligation toward the Indians.” *Mancari*, 417 U.S. at 555. The ICWA provisions that the Individual Petitioners have standing to challenge—the “Indian child” definition and first- and second-rank placement preferences—clear this bar. They rationally protect Indian children, preserve tribal integrity, and promote tribal sovereignty.

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**(i) “Indian Child” Definition**

The definition of “Indian child,” 25 U.S.C. § 1903(4), rationally advances Congress’s trust obligation to Indian tribes. As we noted in *Holyfield*, ICWA’s sponsors backed the legislation, which turns on the “Indian child” definition, in response to evidence that states’ unwarranted removals of Indian children from their communities presented an existential threat to their tribes. During congressional hearings, Calvin Isaac, Chief of the Minnesota Band of Choctaw Indians explained:

Culturally, the chances of Indian survival are significantly reduced if our children, the only real means for the transmission of the tribal heritage, are to be raised in non-Indian homes and denied exposure to the ways of their People. Furthermore, these practices seriously undercut the tribes’ ability to continue as self-governing communities. Probably in no area is it more important that tribal sovereignty be respected than in an area as socially and culturally determinative as family relationships.

*Holyfield*, 490 U.S. at 34 & n.2–3 (noting that ICWA’s majority and minority sponsors, Rep. Morris Udall and Rep. Robert Lagomarsino, shared Isaac’s sentiments). Congress was concerned with protecting the continued existence and integrity of Indian tribes because of its trust relationship towards those tribes, including their future generations. The problem of unwarranted state removals has persisted, and ICWA continues to be a necessary corrective for promoting the best interests of Indian children and their tribes.<sup>10</sup> In fact, 497 federally recognized Indian tribes—representing 86.5 percent of all tribal entities that the BIA recognizes—and 62 tribal organizations and Indian non-profits support ICWA’s continued operation because its “legal protections for children and parents

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<sup>10</sup> In 2016, the Department of the Interior found that there was a continued “need for consistent minimum federal standards” because “Indian families continue to be broken up by the removal of their children by non-tribal and public and private agencies.” 2016 Final Rule, *supra*, at 38,779, 38,748. And states continue to implement and interpret ICWA in inconsistent manners that have yielded “significant gaps.” *Id.* at 38,779. Studies have also documented that Indian children are still three to four times more likely than white children to be placed in foster care in their first encounter with state court systems. *See, e.g.*, Robert B. Hill, *An Analysis of Racial/Ethnic Disproportionality & Disparity at the National, State, and Country Levels*, CASEY-CSSP ALL. FOR RACIAL EQUITY IN CHILD WELFARE 10 (2007), <https://bit.ly/3PSjzrH>. However, because Congress did not enact ICWA pursuant to its Section 5 powers, documenting this continuing need for ICWA is not necessary for establishing ICWA’s constitutionality, as the Petitioners argue. Brief for Individual Petitioners 42; *cf.*, *e.g.*, *Shelby Cnty. v. Holder*, 570 U.S. 529, 553 (2013).

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continue to provide a vital framework for child welfare proceedings.” Brief for 497 Indian Tribes et al. as *Amici Curiae* 13; *see also* 25 U.S.C. § 1903(8); 86 Fed. Reg. 7,554 (Jan. 29, 2021) (publishing the current list of 574 federally recognized tribes). Identifying the children who are subject to ICWA’s requirements is the linchpin of this necessary statutory scheme.

The reliance of the “Indian child” definition on tribes’ self-determined membership criteria is also a critical way that ICWA advances tribal sovereignty and self-government. A tribe’s right to define its own membership “has long been recognized as central to [the tribe’s] existence as an independent political community.” *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 72 n.32 (1978). As we noted above, there is significant variation in membership criteria across tribes and types of membership within tribes. *See supra* Section VI.B. ICWA’s “Indian child” definition accounts for this variety and respects tribes’ choices of how to define their political communities.

Moreover, ICWA is permissibly overinclusive to the extent that its classifications encompass children who are eligible for tribal membership and have a biological parent who is a tribal member (second prong) *but* do not intend to retain their tribal membership into adulthood. As we have applied rational basis review, “[e]ven if the classification involved here is to some extent . . . overinclusive, and hence the line drawn by Congress is imperfect, it is nevertheless the rule that in a case like this ‘perfection is by no means required.’” *N.Y.C. Transit Auth. v. Beazer*, 440 U.S. 568, 592 n.39 (1979) (quoting *Vance v. Bradley*, 440 U.S. 93, 108 (1979)). We respect Congress’s reasonable judgment on how to meet its legitimate goals through ICWA.<sup>11</sup>

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<sup>11</sup> In addition, to the extent it might raise equal-protection concerns to apply ICWA’s “Indian child” definition in a manner that “put[s] certain vulnerable children at a great disadvantage solely because an ancestor—even a remote one—was Indian,” *Adoptive Couple*, 570 U.S. at 655, that would present a distinct case and potential as-applied challenge. However, Petitioners in this case raise *facial* equal-protection challenges to ICWA’s definitions and placement preferences, where they must demonstrate that “no set of circumstances exists under which the [provisions of ICWA] would be valid.” *United States v. Salerno*, 481 U.S. 739, 745 (1987). This is a “heavy burden” that Petitioners fail to carry. *Id.*

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***(ii) Placement Preferences***

The first- and second-ranked placement preferences, 25 U.S.C. § 1915(a)–(b), also rationally protect Indian children and promote tribal integrity and sovereignty. The placement preferences reflect Congress’s assessment that state courts were applying the general “best interest of the child” standard for child-custody proceeding in a way that systematically resulted in unwarranted removals of Indian children from their homes and tribes and placement in non-Indian homes. 25 U.S.C. § 1901(4)–(5). The first-ranked placement preferences for “extended family” operate to keep Indian children within their immediate family network, which likely includes some tribal members due to the “Indian child” definition. This preference mirrors the highest placement preferences for immediate family in child-custody cases across the states, including in Texas. *See, e.g.*, TEX. FAM. CODE ANN. § 262.114(d)(1)–(2) (setting out placement preferences and giving highest preferences to “a person related to the child by blood, marriage, or adoption” and “a person with whom the child has a long-standing and significant relationship”). Similarly, the second-ranked placement preferences, for adoptive or foster placements with other members of the child’s tribe or with homes chosen by the tribe, serve to maintain tribal integrity by keeping the child within their extended tribal community, which is critical for the tribe’s survival. Moreover, by giving tribes a role in defining “extended family” and choosing other family placements, ICWA again emphasizes tribal sovereignty and self-governance.

Other aspects of how the placement preferences operate in state child-custody cases reinforce the rationality of ICWA’s scheme. If no qualified potential adoptive or foster parent falling within the preferences is available, then the placement preferences are “inapplicable” and do not bar a non-Indian family from adopting an Indian child. *Adoptive Couple v. Baby Girl*, 570 U.S. 637, 654 (2013). The “good cause” exception to the placement preferences provides a mechanism for rebutting the application of the placement preferences in specific proceedings. 25 U.S.C. § 1915(a)–

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(b); *see* 2016 Final Rule, *supra*, at 38,838–39; 25 C.F.R. 23.132 (specifying five factors to consider in evaluating “good cause” to deviate from placement preferences and maintaining an “extraordinary circumstances” exception to deviate for other factors not listed). And the state court judge hearing any ICWA case ultimately makes a final, fact-specific determination based on the child’s unique circumstances. Although ICWA may have disadvantaged the Cliffords and Brackeens in their child-custody petitions, that does not make the statutory scheme—or Congress’s decision to use placement preferences tailored to promoting the best interest of Indian children—irrational. “[A] law will be sustained if it can be said to advance a legitimate governmental interest, even if the law . . . works to the disadvantage of a particular group.” *Romer v. Evans*, 517 U.S. 620, 632 (1996) (citations omitted). Congress pursued the legitimate purpose of fulfilling its trust relationship obligations to Indian tribes, and it chose reasonable means in ICWA to protect Indian children, preserve tribal integrity, and promote tribal sovereignty.

\* \* \*

Accordingly, we affirm the Fifth Circuit’s en banc judgment that the Individual Petitioners have standing to challenge on equal-protection grounds ICWA’s first- and second-ranked placement preferences; that Texas possesses standing to bring its anti-commandeering claims; that Congress constitutionally enacted ICWA under its Article I powers; and that ICWA’s “Indian child” definition and first- and second-ranked placement preferences draw political classifications that do not violate equal protection principles. We generally conclude that the challenged ICWA provisions in Sections 1912, 1915, and 1951(a) do not unconstitutionally commandeer state courts or agencies. Our specific holdings are:

- Section 1912(a) (notice) does not unconstitutionally commandeer state agencies, so we reverse the equally divided Fifth Circuit en banc court.

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- Section 1912(d) (“active efforts”) does not unconstitutionally commandeer state agencies, so we reverse the Fifth Circuit majority.
- Section 1912(e) and (f) (expert witnesses & evidentiary standards) do not unconstitutionally commandeer state agencies or courts, so we reverse the Fifth Circuit majority decision as it applies to state agencies but affirm its ruling as it applies to state courts.
- Section 1915(a) and (b) (placement preferences) do not unconstitutionally commandeer state agencies or courts, so we reverse the equally divided Fifth Circuit en banc court as its ruling applies to state agencies but affirm the Fifth Circuit majority’s ruling as it applies to state courts.
- Section 1915(e) (placement record) does not unconstitutionally commandeer state agencies or courts, so we reverse the Fifth Circuit majority’s decision.
- Section 1951(a) (state court recordkeeping) does not unconstitutionally commandeer state courts, so reverse the equally divided Fifth Circuit en banc court.

Finally, we reverse the Fifth Circuit’s en banc judgment that Individual Petitioners have standing to challenge ICWA’s third-ranked placement preferences on equal-protection grounds and that Texas possesses standing to bring its equal-protection and nondelegation claims. We therefore remand the consolidated cases for further proceedings consistent with this order.

*It is so ordered.*

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June 11, 2023

The Honorable Kiyo Matsumoto  
Theodore Roosevelt United States Courthouse  
225 Cadman Plaza East, Room 905 S  
Brooklyn, NY 11201-1818

Dear Judge Matsumoto:

I am a University of Virginia Law alumna hoping to clerk in your chambers for the 2025-2026 term. As a first-generation law student who was the first in my family to move off our farm, I hope to bring a unique perspective to your chambers. Due to the limited opportunities that my hometown provided, I started college at 15, attending a local community college, while simultaneously working two jobs. I later transferred to Syracuse University, where I graduated *summa cum laude* at 19 — completing a double major and the honors curriculum while working full-time to fund my education. After graduation, I accepted a position teaching at a public charter school in Ward 8 of Washington, D.C. Though teaching was incredibly rewarding, my passion for writing and legal analysis led me to apply to law school, and I currently work at Venable, LLP as a litigation associate.

During my legal career, I have refined my research and writing skills through internships with Chief Judge Beryl Howell at the D.D.C. and as a Submissions Editor for the Virginia Journal of International Law. At Venable, I have been afforded the opportunity to take on tasks that are typically reserved for mid- to senior-level associates, such as taking depositions of key witnesses and drafting multiple motions for summary judgment in their entirety. While my work at Venable has offered the chance to participate in various portions of mediations, arbitrations, and trials, opportunities to experience litigation from start to finish are rare. A clerkship under your guidance will accelerate my development as a litigator and continue to hone my legal research and writing skills.

Please find my resume, writing sample, and law school transcript attached. Thank you for your time and consideration.

Sincerely,

*Page Garbee-Kim*

Page Garbee-Kim

## Page Garbee-Kim

1622 5<sup>th</sup> Street N.W., Unit B Washington, DC 20001 | pag8gy@virginia.edu | (434) 660-6397

### EDUCATION

#### University of Virginia School of Law, Charlottesville, VA

*J.D.*, May 2021

- Virginia Law Scholarship (merit-based scholarship)
- *Virginia Journal of International Law*, Submissions Editor
- Student Bar Association, 2L Senator and Health & Wellness Committee Chair
- Volunteering: Street Law, Director of Curriculum; Lambda Law Alliance; Virginia Law First-Generation Professionals; Virginia Law Women; Child Advocacy Clinic

#### Syracuse University, Syracuse, NY

*B.S.*, Political Science and Rhetorical Studies, *summa cum laude*, May 2015

- Renee Crown University Honors Program Thesis: A Comparison of Communication Practices in Hazing and Domestic Violence Situations
- Mary E. Earle Endowed Prize (for excellence in research and writing)
- White Denison Grand Prize (in recognition of exemplary public speaking)

### EXPERIENCE

#### Venable, LLP, Washington, DC

*Litigation Associate*, June 2020 – Present

- Managed work across numerous practice areas, including labor and employment, advertising, and insurance
- First-chaired deposition in complex litigation matter, including the development of strategy and questions
- Drafted substantive memoranda in both litigation and regulatory matters, including motions for summary judgment, discovery motions, motions to compel, white papers, and reverse FOIA requests
- Analyzed and revised complex contracts and documents, including insurance policies, separation agreements, settlement agreements, and employment policies

#### The Honorable Beryl A. Howell, United States District Court (D.D.C.), Washington, DC

*Judicial Intern*, May – August 2019

- Conducted legal research on civil and criminal matters pending before the court
- Drafted internal memoranda on the rules of civil procedure, international law, and administrative law
- Completed cite checks for opinions on administrative law, civil damages, and other final orders
- Drafted portions of opinions including sections on questions of standing, statutory background, case-specific facts, and procedural history

#### Legal Aid Justice Center, Just Children Program, Charlottesville, VA

*Volunteer*, August 2018 – May 2019

- Served as liaison between clients and supervising attorneys, conducted intake interviews, and reviewed cases in order to provide free representation to low-income families and ensure equitable education outcomes

#### Achievement Preparatory Academy, Washington, DC

*Teacher*, August 2015 – June 2018

- Chair of the Co-Curricular Team, Reader Leader Committee (encouraged scholar achievements in literacy), MAP/PARCC Testing Committee (organized school-wide testing and partnered with families to increase preparedness), and the SOW Committee (created incentives for positive scholar behavior)
- Awarded Teacher of the Month in June 2017 and March 2018 for leadership and innovation by designing the first performing and visual arts curriculum in an under-resourced district

#### Community for Learning Advancement, Lynchburg, VA

*Associate Director & Founder*, May 2015 – July 2017

- Crafted the mission statement, by-laws, and various marketing materials to provide educational supplies and scholarships across 13 public schools in the county
- Responsible for fundraising, public speaking, and donor relationship management
- Supplemented work with legislative advocacy, particularly for increased school funding and gifted education programs

### INTERESTS

- Farming and Animal Husbandry; Watercolor Painting; Vintage Teacups; Barre Instructor

## Page A Garbee

09/18/2021

## Degrees Conferred

Confer Date: 05/23/2021  
Degree: Juris Doctor  
Major: Law

## Beginning of Law Record

## 2018 Fall

School:	School of Law		
Major:	Law		
LAW	6000	Civil Procedure	B+ 4.0
LAW	6002	Contracts	B+ 4.0
LAW	6003	Criminal Law	A- 3.0
LAW	6004	Legal Research and Writing I	S 1.0
LAW	6007	Torts	B 4.0

## 2019 Spring

School:	School of Law		
Major:	Law		
LAW	6001	Constitutional Law	B+ 4.0
LAW	6005	Lgl Research & Writing II (YR)	S 2.0
LAW	6006	Property	A- 4.0
LAW	6104	Evidence	A- 4.0
LAW	7023	Emphy Law: Contrcts/Torts/Stat	A- 3.0

## 2019 Fall

School:	School of Law		
Major:	Law		
LAW	8606	Child Advocacy Clinic (YR)	CR 4.0
LAW	9074	Legis Drafting & Public Policy	B+ 3.0
LAW	9089	Seminar in Ethical Values (YR)	YR 0.0
LAW	9294	Drug Prod Liability Litgn Sem	A- 2.0
LAW	9324	Law, Inequality & Educ Reform	A- 3.0

## 2020 Spring

School:	School of Law		
Major:	Law		
LAW	7064	Nonprofit Organizations	CR 3.0
LAW	7071	Professional Responsibility	CR 2.0
LAW	7105	Modern Real Estate	CR 3.0
LAW	7163	Legislation and Regulation	CR 4.0
LAW	8607	Child Advocacy Clinic (YR)	CR 4.0
LAW	9090	Seminar in Ethical Values (YR)	CR 1.0

## 2020 Fall

School:	School of Law		
Major:	Law		
LAW	7022	Employment Discrimination	A- 3.0
LAW	7795	Art Law (SC)	A- 2.0
LAW	7808	Cryptocurrency Reg (SC)	A 1.0
LAW	8009	Copyright Law	B+ 3.0
LAW	8026	Taking Effective Depositions	A- 2.0
LAW	9087	Internatl Environmental Law	A 3.0

## 2021 Spring

School:	School of Law		
Major:	Law		
LAW	6102	Administrative Law	A 4.0
LAW	7014	Conflict of Laws	A 3.0
LAW	7103	Education Law Survey	A 3.0
LAW	7820	Higher Education & Law (SC)	A- 1.0
LAW	7825	Internal Investigations (SC)	A- 1.0

End of Law School Record



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June 13, 2022

Mary M. Gardner

T 202.344.4398  
F 202.344.8300  
MMGardner@Venable.com

Re: Recommendation for Page Garbee Kim's Selection for a Federal Judicial Clerkship

To Whom it May Concern:

It is my pleasure to write this letter of recommendation for Page Garbee Kim in support of her application for a federal judicial clerkship. I highly recommend Page for a judicial clerkship.

I first met Page when she was a summer associate at Venable LLP in 2020. Page stands out as one of the most impressive candidates with whom I've worked in my (now) six years of work with Venable's summer associates. She assisted me with a complex assignment for a hospitality group regarding the availability of insurance proceeds for COVID-19 related business interruptions. Since returning to Venable in September 2021, I have worked with Page at every possible opportunity. Indeed, she is the first associate I turn to when I have a new case or research question. Page has assisted me with the following work assignments: She answered complicated research assignments in the insurance and advertising compliance fields, played an integral role in trial preparation for a case pending in the District of Maryland, drafted a substantive portion of a brief in opposition to a motion for summary judgment, and researched and drafted most of a response to an arbitration complaint.

Page has many strengths that make her an exceptional associate. In this letter, I would like to highlight four strengths that I believe make Page a highly competitive applicant for a judicial clerkship.

First, Page has strong research and writing skills. When Page was a summer associate, I evaluated her research and writing skills as comparable to those of a seasoned third- or fourth-year associate, rather than a law school student. Indeed, Page's final work product was so well done that I struggled to find constructive feedback to give her. Page has excelled in the two years that have passed. She recently drafted an almost 40-page response to an arbitration complaint—an assignment that I would usually give to a fourth- or fifth-year associate. She demonstrated a strong understanding of the facts of the case, her research uncovered compelling case law and statutory support for her argument, and her analysis of how the law applied to the facts was sound. Ultimately, her draft was clean, organized effectively, and well-written.

Second, Page is a strong communicator. The year that Page participated in Venable's summer program, the program was offered virtually with no opportunity to meet in person. Several



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candidates struggled with communication in a virtual office—but not Page. Page has continued to excel at communication in a hybrid office environment. She provides timely updates on the status of assignments and is comfortable communicating directly with clients. Significantly, Page is a strong and confident advocate. If she disagrees with my analysis of an issue, she will respectfully raise her concerns. These discussions with Page have become an integral part of my deliberative process.

Third, Page is well-organized. When Page is assigned to a new case, she prioritizes ensuring that the relevant documents are organized. In fact, I have derived great benefits from Page's disciplined approach to file management. When Page returned to Venable last year, she joined one of my pending cases and immediately took ownership of organizing the document repository.

Finally, Page is a pleasure to work with. She is collaborative, energetic, responsible, and hard working. Several days last week, Page worked late nights and early mornings, without losing her good-natured manner or sacrificing the quality of her work product.

I give my full recommendation to Page.

Sincerely,

A handwritten signature in black ink, appearing to read "Mary M. Gardner".

Mary M. Gardner